

# Chapter 1 - US intelligence accountability

In the last decade, the canon of research on intelligence accountability has grown steadily.<sup>1</sup> Scholars have expanded our understanding of intelligence accountability systems (in particular in former communist states and developing countries)<sup>2</sup> and considered accountability in the light of new contextual developments such as the Global War on Terrorism<sup>3</sup> as well as sharpened critiques of well-established accountability systems.<sup>4</sup> This chapter relies on this literature to develop a conceptual framework in order to better understand and qualify how intelligence accountability functions in the United States. Three approaches to intelligence accountability are explored. They focus on the institutions of accountability, the standards of accountability and the application of these standards through the accountability process. The institutional approach is the most descriptive and focuses on the authority and capacity of intelligence accountability holders. When answering the question ‘accountable to whom?’, this approach provides an introduction to the bureaucracy of intelligence accountability in the US. In the US, a variety of stakeholders and processes contribute to what can be characterised as one of the most developed systems of intelligence accountability in the world. The second approach examines the essence of democratic intelligence accountability: the relationship between liberal democratic values (civil liberties, human rights, transparency, and the rule of law) and national security. This relationship is considered openly as a trade-off which constantly varies from one situation to another. In turn, this analytical lens helps assessing the quality of intelligence accountability at a certain point in time. In the optimal situation, accountability holders are able to safeguard or even improve both national security and liberal democratic values. Finally, accountability is presented as a process that is divided in three phases: the occurrence of a problem, reactions

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<sup>1</sup> For broad studies, see: Hans Born, Loch Johnson, and Ian Leigh, *Who's Watching the Spies? Establishing Intelligence Service Accountability* (Washington DC: Potomac 2005); Loch K. Johnson (ed.), *Strategic Intelligence, Volume 5. Intelligence and Accountability: Safeguards Against the Abuse of Secret Power* (Westport, CT: Praeger Security International 2007).

<sup>2</sup> For example of studies on democratic intelligence accountability in former communist states, see: Marina Caparini and Hans Born, *Democratic Control of Intelligence Services: Containing Rogue Elephants* (Aldershot: Ashgate 2007); Florina Cristina Matei and Thomas C. Bruneau, ‘Policymakers and Intelligence Reforms in New Democracies’, *International Journal of Intelligence and CounterIntelligence* 24/4 (2011) pp. 656-91.

<sup>3</sup> See for example: Björn Müller-Wille, ‘Intelligence and Democratic Accountability: A Blessing, not a Curse’, *European Security* 15/4 (2006) pp. 491-506; Peter Gill, ‘Security Intelligence and Human Rights: ‘Illuminating the Heart of Darkness’?’, *Intelligence and National Security* 24/1 (2009) pp. 78-102.

<sup>4</sup> See for example: Marvin Ott, ‘Partisanship and the Decline of Intelligence Oversight’, *International Journal of Intelligence and Counter Intelligence* 16/1 (2003) pp. 69-94; Jennifer Kibbe, ‘Congressional Oversight of Intelligence: Is the Solution Part of the Problem?’, *Intelligence and National Security* 25/1 (2010) pp. 24-49; Amy B. Zegart, ‘The Domestic Politics of Irrational Intelligence Oversight’, *Political Science Quarterly* 126/1 (2011) pp. 1-25.

and responses from accountability holders, and specific outcomes. This approach provides a useful framework to explore how accountability works in specific situations. This angle also allows a dynamic synthesis of the two first approaches developed in the chapter and underpins the central argument that is developed throughout the thesis.

### **The institution(s) of intelligence accountability**

At its most basic level, accountability supposes a relationship between an accountability holder and an accountability holdee.<sup>5</sup> This relationship is characterised by the delegation of authority from the principal to the agent, which subsequently bears responsibilities.<sup>6</sup> At the core of the accountability interaction, the holdee has a formal or informal obligation to explain and justify his/her conduct to the holder, who can access relevant information and pass judgments based on particular standards, so that the holdee may face consequences and may have to provide some answers, be redirected or even imposed some sanctions.<sup>7</sup> This understanding of accountability allows for a broad approach that fits well with this thesis project. Mark Bovens highlights a multitude of accountability mechanisms depending on the nature of the actors involved, the type of activity that is concerned, or the type of obligation imposed upon the agent.<sup>8</sup> Accountability can, for example, focus on bureaucratic, legal, political, professional, individual or collective, corporate, hierarchical, financial, procedural aspects.<sup>9</sup> According to Edward Weber, the significance given to one type of accountability over another varies over time - which points to the importance of specifying the context in which accountability relationships take place.<sup>10</sup> In practice, there are many types of accountability that are not democratic, such as professional accountability or peer review, and can restrain power effectively. In the realm of national security intelligence, accountability can be understood as a set of relationships between multiple intelligence accountability holders and intelligence services providers.<sup>11</sup> In the context of a democracy, intelligence

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<sup>5</sup> Robert D. Behn, *Rethinking Democratic Accountability* (Washington D.C: Brookings Institution Press 2001) p.2.

<sup>6</sup> Thorsten Wetzling, 'The Democratic Control of Intergovernmental Intelligence Cooperation', *DCAF Working Paper No.165* (2006).

<sup>7</sup> Mark Bovens, 'Analysing and Assessing Accountability: A conceptual framework', *European Law Journal* 13/4 (2007) pp. 450-2.

<sup>8</sup> *Ibid.*, p.461.

<sup>9</sup> Behn, *Rethinking Democratic Accountability*, p.59; Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics', *American Political Science Review* 99/1 (2005) p.36; Bovens, 'Analysing and Assessing Accountability', p.461.

<sup>10</sup> Edward P. Weber, 'The Question of Accountability in Historical Perspective. From Jackson to Contemporary Grassroots Ecosystem Management', *Administration and Society* 31/4 (1999) pp. 451-94.

<sup>11</sup> Bovens, 'Analysing and Assessing Accountability', pp. 450-2; Wetzling, 'The Democratic Control of Intergovernmental Intelligence Cooperation'. Intelligence accountability holdees are typically related to one or

accountability consists of a set of relationships in which power-wielders and their intelligence agencies are accountable to broad public and their representatives.

### **A typology of democratic intelligence accountability holders**

In modern democracies, accountability relations rely on a formal or informal constitution that arranges a delegation of sovereignty from the people to the institutions of government (the executive, legislative and judicial branches).<sup>12</sup> The relationship between the people and their government is diluted into a set of institutional relations. Each institution checks and balances the others' powers and, when doing so, acts both as an accountability holder and holdee. Logically, most studies of intelligence accountability have focused on this institutional system of checks and balances, and its organisation across the three branches of government.<sup>13</sup> In addition, since these institutions are accountable to the people, who delegated sovereignty to them, the role of wider society or citizens, private organisations and media as an accountability holder is crucial.

The literature on intelligence accountability uses various terms to refer to the work of intelligence accountability holders and the constraints they put on intelligence producers and consumers. According to Peter Gill and Mark Phythian, this semantic diversity reflects the contest for influence and access to knowledge within the intelligence bureaucracy.<sup>14</sup> In some studies, terms such as accountability, oversight, and control are used interchangeably.<sup>15</sup> When there is a typology, it usually follows the aphorism *where one stands is influenced by where*

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more of the 16 intelligence agencies forming the US intelligence community. See: US Congress, Pub. Law 80-253, National Security Act of 1947, 80<sup>th</sup> Congress, 1<sup>st</sup> sess., 26 July 1947, Section 3(4).

<sup>12</sup> O. Hood Phillips, Paul Jackson, and Patricia Leopold, *Constitutional and Administrative Law* (London: Sweet & Maxwell 2001) p.5.

<sup>13</sup> For examples of institutional approaches to intelligence accountability, see: Loch K. Johnson, *A Season of Inquiry. The Senate Intelligence Investigation* (Lexington, KY: The University Press of Kentucky 1985); Marshall Silverberg, 'The Separation of Powers and Control of the CIA's Covert Operations', *Texas Law Review* 68/3 (1990) pp. 575-622; Frederick F. Manget, 'Intelligence and the Rise of Judicial Intervention. Another System of Oversight', *Studies in Intelligence* 39/5 (1996) pp. 43-50; Frederick M. Kaiser, 'GAO Versus the CIA: Uphill Battles against an Overpowering Force', *International Journal of Intelligence and CounterIntelligence* 15/3 (2002) pp. 330-89; Loch K. Johnson, 'The Contemporary Presidency: Presidents, Lawmakers, and Spies: Intelligence Accountability in the United States', *Presidential Studies Quarterly* 34/4 (2004) pp. 828-37; Hans Born and Ian Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies* (Oslo: Publishing House of the Parliament of Norway 2005).

<sup>14</sup> Peter Gill and Mark Phythian, *Intelligence in an Insecure World* (Cambridge: Polity 2006) p.151.

<sup>15</sup> For some examples of typologies or their absence: DCAF Intelligence Working Group, 'Intelligence Practice and Democratic Oversight – A Practitioner's view', *DCAF Occasional Papers No. 3* (2003) p.33; Loch K. Johnson, 'Accountability and America's Secret Foreign Policy: Keeping a Legislative Eye on the Central Intelligence Agency', *Foreign Policy Analysis* 1/1 (2005) p.99; idem, 'Governing in the Absence of Angels: On the Practice of Intelligence Accountability in the United States', in Born, Johnson, and Leigh (eds), *Who's Watching the Spies?*, p.58; Mark Lowenthal, *Intelligence. From Secrets to Policy* (Washington DC: CQ Press 2006) p.192; Born and Caparini, *Democratic Control of Intelligence Services*, p.8.

one sits,<sup>16</sup> to distinguish between different accountability holders, their specific approach to and motivation for intelligence accountability. This is a good starting point because it emphasises how different actors give different meanings to accountability. For example, a former staff member of the President's Foreign Intelligence Advisory Board points out that the executive branch is typically more concerned with the performance of the intelligence community (IC).<sup>17</sup> Given the existence of lexical discrepancies in the literature, the terminology adopted in this thesis needs to be clarified.<sup>18</sup> The use of a specific typology should not overshadow the fact that, in practice, the terms and mechanisms of intelligence accountability overlap to some degree. In this thesis, democratic intelligence accountability is divided into the following categories: executive control, legislative oversight, judicial review, and societal scrutiny.<sup>19</sup> This typology deliberately leaves the question of the responsibility of intelligence services beyond their national sphere of legitimacy or international intelligence accountability aside.<sup>20</sup> Security intelligence and democracy both find their essence in the nation. Even though they cooperate extensively at the international level, intelligence agencies remain national agencies. In addition, democracy is essentially based on the state and the expression of its citizens' preferences.

### Executive control

The executive branch is traditionally organised in a hierarchical fashion which gives senior officials varying degrees of control over their employees' activities. In this control function, senior executive officials benefit from a unique position in order to set 'the conditions that lead to the achievement of agreed standards of performance'.<sup>21</sup> They manage and direct their organisation on a daily basis and use their authority to make sure procedures are followed by their accountability holdees.<sup>22</sup> Control is mostly administrative at the internal level when it

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<sup>16</sup> On the origins of this aphorism, see: Rufus E. Miles, 'The Origin and Meaning of Miles' Law', *Public Administration Review* 38/5 (1978) pp. 399-403. For more on this type of argument, see: Graham Allison and Philip Zelikow, *Essence of Decision. Explaining the Cuban Missile Crisis* (New York: Longman 1999) pp. 143-244.

<sup>17</sup> Former Senior Intelligence Official C, interview with author, 26 July 2011, Washington DC.

<sup>18</sup> For a similar point, see: Walter J. Oleszek 'Congressional Oversight: an Overview', Congressional Research Service Report to Congress, 22 February 2010, p.4.

<sup>19</sup> See: Born and Leigh, *Making Intelligence Accountable*, *passim*.

<sup>20</sup> On this question, see for example: Elizabeth Sepper, 'Democracy, Human Rights, and Intelligence Sharing', *Texas International Law Journal* 46/1 (2010) pp. 151-207.

<sup>21</sup> DCAF Intelligence Working Group, 'Intelligence Practice and Democratic Oversight', p.39; Peter Gill, 'Democratic and Parliamentary Accountability of Intelligence Services after September 11<sup>th</sup>', *DCAF Working Paper* 103, January 2003, p.3; Gill and Phythian, *Intelligence in an Insecure World*, p.151.

<sup>22</sup> Abram Shulsky and Gary Schmitt refer to the management of intelligence to describe the relationship between intelligence and the government. Abram N. Shulsky and Gary J. Schmitt, *Silent Warfare: Understanding the World of Intelligence* (Washington DC: Potomac Books 2002) p.129. See also: Arthur S. Hulnick, *Fixing the Spy Machine. Preparing American Intelligence for the Twenty-First Century* (London: Praeger 1999) pp. 17-20.

takes the form of directives and instructions within a specific agency or a specific programme.<sup>23</sup> It is more political at the external level when senior decision-makers define strategies.<sup>24</sup> In all these cases, the term adequately describes the role of the executive branch of government as having a principal responsibility for giving direction and providing day-to-day supervision to the US intelligence community. Senior executive officials task, prioritise, make resources available, and ensure the proper execution of national security policies.<sup>25</sup> In some cases, the accountability activities of some offices within the executive branch are better described in terms of independent control to reflect the accountability holder's position. This is particularly the case of Offices of Inspector General that are formally part of the executive branch but do not carry out a hierarchical control of intelligence activities.

### Legislative oversight

In most modern democracies special legislative committees contribute to the direction taken by the national security policy and carefully watch the implementation of this policy into programmes that are carried out by the intelligence agencies.<sup>26</sup> The term oversight fits well the position of the legislature which looks over the shoulder of the executive branch to assess its policies, their implementation, and when deemed necessary oppose them. In other words, congressional oversight refers to the accountability relation that exists between the Congress, intelligence agencies and their political masters. The position of the Congress is important because, in theory, the independence of the legislative branch makes it a more reliable accountability holder than the executive branch. However, the position of the legislature as an outsider limits its knowledge and its hold on intelligence activities. In addition, political divergences and limited resources can undermine congressional oversight. In this sense, Hans Born, Loch Johnson and Ian Leigh argue that oversight is looser than control.<sup>27</sup>

### Judicial review and societal scrutiny/support

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<sup>23</sup> See: Federation of American Scientists, 'Defense Department Intelligence and Security Doctrine, Directives and Instructions', <<http://www.fas.org/irp/doddir/dod/>> (accessed 4 May 2013).

<sup>24</sup> See for example: US Government, The National Security Strategy of the United States of America, September 2002.

<sup>25</sup> Hans Born, 'Parliamentary and External Oversight of Intelligence Services', in Born and Caparini (eds), *Democratic Control of Intelligence Services*, pp. 167-8.

<sup>26</sup> This approach is based on: Lowenthal, *Intelligence. From Secrets to Policy*, p.192; Gill and Phythian, *Intelligence in an Insecure World*, p.151; Born, 'Parliamentary and External Oversight of Intelligence Services', p.167; DCAF intelligence Working Group, 'Intelligence Practice and Democratic Oversight', pp. 47-8.

<sup>27</sup> Born, Johnson, and Leigh, *Who's Watching the Spies?*, pp. 6, 226.

Judicial review refers to the process under which the Judiciary appraises governmental actions. Executive and legislative actions are subject to review by the Judiciary (the courts), which can invalidate decisions and impose sanctions. The courts carrying out this review are crucial in supporting the separation of powers and individual liberties. This type of accountability relationship invariably refers to legality and the application of constitutional standards that differ from one country to another. In most Western countries, specific courts and procedures apply to the judicial review of intelligence activities. In turn, judicial review differs from executive control and legislative oversight because it does not involve steering power. Yet the courts can get involved before intelligence activities take place. Frederick Manget, a former Central Intelligence Agency (CIA) lawyer, points out that in the US the courts interact with the intelligence community on a more informal level before agencies take action, in order to assess their potential legality.<sup>28</sup> In turn, judicial review depends on the laws that are passed by the legislature, the regulations that are enacted by the executive branch, and the ability and willingness of key individuals to invoke them.

‘Scrutiny’ usually refers to the critical examination of a phenomenon. Although it also refers to specific mechanisms of judicial review in the US, in this thesis the expression is mostly used in the context of societal scrutiny.<sup>29</sup> The term fits well the supportive role society (individuals, private organisations, and media) plays in democratic systems of intelligence accountability. In modern democracies, individual citizens can directly hold their representatives to account through elections. In practice though, the outcome of free elections is rarely (if ever) defined by intelligence affairs. In addition, public interest groups and media can hold intelligence consumers and producers to account through the mobilisation of public opinion. Compared to the three branches of government, society lacks the power to impose sanctions. In fact, for most institutional mechanisms of intelligence accountability, citizens, private organisations and media are only able to step in and provide crucial support to other intelligence accountability holders.<sup>30</sup>

## **US intelligence accountability holders: balancing powers and responsibilities**

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<sup>28</sup> Manget, ‘Intelligence and the Rise of Judicial Intervention’, p.43.

<sup>29</sup> Eugene Volokh, ‘Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny’, *University of Pennsylvania Law Review* 6 (1997) pp. 2417-62; Tania Cruz, ‘Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When Fears and Prejudices Are Aroused’, *Seattle Journal for Social Justice* 2/1 (2003) pp. 129-97.

<sup>30</sup> Damien Van Puyvelde, ‘Intelligence accountability and the role of public interest groups in the US’, *Intelligence and National Security* 28/2 (2013) pp. 139-58.

### Accountability and the origins of the US democracy

The US system of intelligence accountability follows directly from the specific organisation of democratic accountability in this state. In the US political system, the separation of powers and the limits put on the federal government have generated a highly elaborate system of democratic accountability.<sup>31</sup> The case of the US is particularly worth considering because of the strong and wide influence the US Constitution and the Federalist Papers have had on the formation of other liberal democracies around the world.<sup>32</sup> At the origin of the US Republic resides the Declaration of Independence (1776) which holds ‘Governments are instituted among Men, deriving their just powers from the consent of the governed’.<sup>33</sup> The question of how to provide a balanced representation of individuals’ will was at the core of the debates preceding the birth of the American Constitution of 1787. The Founding Fathers of the US feared that republicanism, which advocates that the public thing is the thing of the people, and democracy, or the government of the people, by the people, for the people,<sup>34</sup> would give birth to a new despotism. In the very heterogeneous American society, basing democracy on individual autonomies could threaten the harmony of the society and the achievement of representativeness. In essay ten of the Federalist Papers, James Madison recognised that political freedom inevitably creates factions and the necessity to attempt to control their effects.<sup>35</sup> The Framers of the US Constitution strived to find mechanisms to balance democracy and to limit the tyranny of the particular interests on the system of representation.<sup>36</sup> The resolution of this dilemma between pluralism and representation through a system of checks and balances forms the basis of the American political system.<sup>37</sup> This system relies on an institutional balance that is achieved thanks to the ‘disaggregation of

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<sup>31</sup> See: Michael Foley, *Laws, men and machines: modern American government and the appeal of Newtonian mechanics* (London: Routledge 1990) *passim*.

<sup>32</sup> Lawrence Goldman, ‘Introduction’, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Oxford: Oxford University Press 2008) p. xxviii; Louis Henkin and Albert J. Rosenthal (eds), *Constitutionalism and Rights. The Influence of the United States Constitution Abroad* (New York: Columbia University Press 1990).

<sup>33</sup> National Archives and Records Administration: The Declaration of Independence: a Transcription, <[http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html)> (accessed 28 August 2011).

<sup>34</sup> Abraham Lincoln, ‘Extract from Gettysburg Address’, in Elizabeth M. Knowles (ed.), *The Oxford Dictionary of Quotations* (Oxford: Oxford University Press 2001) p.468.

<sup>35</sup> James Madison, ‘The Federalist, 10’, in Lawrence Goldman (ed.), *The Federalist Papers* (Oxford: Oxford University Press 2008) pp. 51-2.

<sup>36</sup> Gordon S. Wood, *The Creation of the American Republic. 1776-1787* (London: University of North Carolina Press 1993) p.411.

<sup>37</sup> For a good summary of this dilemma, see: Jeffrey M. Berry and Clyde Wilcox, *The Interest Group Society* (New York: Pearson Longman 2007) pp. 1-13.

democracy'.<sup>38</sup> The Founding Fathers separated powers to weaken the government and prevent sacrificing 'the public good to the private greed of small ruling groups'.<sup>39</sup> Thomas Jefferson explained this separation when describing the Constitution of the Commonwealth of Virginia:

The powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by others. For this reason ... the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.<sup>40</sup>

In Philadelphia, during the Federal Convention (1786-7), the Framers agreed to separate powers horizontally and vertically. Horizontally, they separated the judicial, executive and legislative powers. Each branch of the government would have different competencies and authorities such as the congressional power of the purse, or the application of the rule of law by the courts.<sup>41</sup> Vertically, the federal state was to serve general purposes, while federate states would tackle local problems.<sup>42</sup> Eventually, power was dispersed so that each organ detained a fragment of it and would struggle to defend this parcel against other organs' impingement.<sup>43</sup> This system, aimed to prevent a single institution holding an 'unchallenged position of dominance in all aspects of the conduct of public affairs'.<sup>44</sup> According to Richard Neustadt's famous characterisation, in the American system of government, separated institutions share powers.<sup>45</sup>

In practice, private organisations (interests groups, corporations, labour unions and so on) came to be considered as a part of this American system of check and balances.<sup>46</sup> From the early days of the American Republic onwards, political thinkers regularly emphasised the

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<sup>38</sup> Michael Foley, *American credo: the place of ideas in US politics* (Oxford: Oxford University Press 2007) p.80.

<sup>39</sup> Wood, *The Creation of the American Republic*, p. 54.

<sup>40</sup> Thomas Jefferson, 'Notes on the State of Virginia', in Albert Ellery Bergh, *The Writings of Thomas Jefferson: Volume 2*, p.163, <<http://etext.lib.virginia.edu/etcbin/toccer-new2?id=JefBv021.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all>> (accessed 20 January 2012).

<sup>41</sup> US Constitution, Article 1, Section 7, Clause 1. On the rule of Law and the defense of the superiority of the US constitution by the judiciary, see: US Supreme Court, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 1803.

<sup>42</sup> This division was the result of debates between the Federalists and the Anti-Federalists. For more on the origins, evolution and legacies of Anti-Federalism, see: Saul Cornell, *Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill, NC: University of North Carolina Press 1999).

<sup>43</sup> Élisabeth Zoller, *Introduction au Droit Public* (Paris: Dalloz 2006) p.133; James Madison, 'The Federalist, 48', in Goldman, Lawrence (ed.), *The Federalist Papers* (Oxford: Oxford University Press 2008) p.245.

<sup>44</sup> Amos A. Jordan et al., *American National Security* (Baltimore, MD: John Hopkins University Press 2009) p.95.

<sup>45</sup> Richard E. Neustadt, *Presidential Power and the Modern Presidents: the politics of leadership from Roosevelt to Reagan* (New York: Free Press 1990) p.29.

<sup>46</sup> Lewis Lipsitz, *American Democracy* (New York: St. Martin's Press 1986) pp. 70, 267.



abundance of organised interests characterising the American political culture.<sup>47</sup> In turn, by leaving space for diversity and pluralism to flourish, the Framers made sure that no unique coalition would withhold a monopoly of political power. Plurality, or the concurrence of interests, was deemed to be the guarantor of liberties. That is why, in this system, the promotion of interests by organised groups pursuing public or private ends is considered as legitimate as long as transparency exists.<sup>48</sup> The thesis therefore considers both the role of the three branches of government and wider society as intelligence accountability holders.

### The executive branch

The executive branch rests on the legitimacy granted by a democratically elected President to control intelligence services. In the US, the President has traditionally held a crucial role in the formation and the execution national security.<sup>49</sup> However, most executive powers are constrained by or shared with Congress. Yet the executive branch bears the primary responsibility for the scope and conduct of intelligence activities.<sup>50</sup> At the highest level, the President issues Executive Orders. One of the most important orders in the realm of national security intelligence is Executive Order 12333 which determines ‘Goals, Direction, Duties and Responsibilities With Respect to the National Intelligence Effort’, ‘the Conduct of Intelligence Activities’, and provides other ‘General Provisions’.<sup>51</sup> In addition, the President nominates political appointees, such as the Secretary of Defense, the Director of National Intelligence (DNI), and the Director of the CIA, who set agendas reflecting his/her national security preferences.<sup>52</sup> At this senior level, the nomination of political appointees is confirmed by the Senate. The President can also require specific inquiries when convinced that internal investigations will not be sufficient.<sup>53</sup> This was the case, for example, of the US

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<sup>47</sup> See for example: Alexis de Tocqueville, *Democracy in America* (New York: Doubleday 1969) pp. 192-3; Robert Dahl, *Who Governs?* (New Haven, CT: Yale University Press 1961); David Truman, *The Governmental Process* (New York: Knopf 1951); Nelson W. Polsby, *Community Power and Political Theory* (New Haven, CT: Yale University Press 1980).

<sup>48</sup> Zoller, *Introduction au Droit Public*, p.128.

<sup>49</sup> Jordan et al., *American National Security*, pp. 73, 76; Neustadt, *Presidential Powers and the Modern President*; Christopher Andrew, *For the President's Eyes Only. Secret Intelligence and the American Presidency from Washington to Bush* (New York: Harper Perennial 1996).

<sup>50</sup> John Jay, ‘The Federalist, 64’, in Goldman (ed.) *The Federalist Papers*, pp. 317-8; Morgan R.E., *Domestic Intelligence. Monitoring Dissent in America* (London: University of Texas Press 1980) p.112.

<sup>51</sup> Executive Order 12333, United States Intelligence Activities, 4 December 1981. Executive Order 12333 was amended by Executive Orders 13284 (2003), 13355 (2004) and 13470 (2008). See: Federation of American Scientists, ‘Executive Order 12333, United States Intelligence Activities’, <<http://www.fas.org/irp/offdocs/eo/eo-12333-2008.pdf>> (accessed 10 May 2012).

<sup>52</sup> Lowenthal, *Intelligence From Secrets to Policy*, p.207.

<sup>53</sup> For example, the 9/11 Commission was created by a Public Law initiated by President George W. Bush. See: US Congress, Pub. Law 107-306, and Intelligence Authorization Act for Fiscal Year 2003, 107<sup>th</sup> Congress, 2<sup>nd</sup> sess., 27 November 2002.

Presidential Commission on CIA Activities within the United States, which was set up by President Ford in 1975 and is often referred to as the 'Rockefeller Commission'.<sup>54</sup>

When carrying out his responsibilities, the President is helped by a series of institutions within the Executive Office of the President. The National Security Council (NSC) supports the President in two crucial domains: policy planning, and coordinating and monitoring operations.<sup>55</sup> The President's Intelligence Advisory Board (PIAB) offers expert advice to the President on intelligence matters, but, formally, it has no line authority.<sup>56</sup> Within the PIAB, the Intelligence Oversight Board (IOB) 'oversees the Intelligence Community's compliance with the Constitution and all applicable laws, Executive Orders, and Presidential Directives'.<sup>57</sup> The Office of Management and Budget (OMB) helps the President allocating national resources in order to implement his/her political agenda. Within the OMB, a specific office is dedicated to national security programmes.<sup>58</sup> Two of the OMB's most important tasks are the formulation and execution of the US budget, and the oversight of government agencies' performance.<sup>59</sup>

At a lower level, the bureaucracy ensures the implementation of policies. Executive control primarily occurs through day-to-day management and administrative accountability in each intelligence agency for all types of intelligence activity (collection, analysis, dissemination, counter-intelligence etc.). This control rests on a set of internal guidelines and procedures specific to each agency.<sup>60</sup> In the Department of Defense (DOD), for example, an Assistant to the Secretary of Defense is responsible for intelligence oversight (ATSD(IO)).<sup>61</sup> When violations occur, intelligence officers must 'identify, investigate, and report violations

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<sup>54</sup> Nelson A. Rockefeller et al., Commission on CIA Activities within the United States, Report to the President, 6 June 1975, <<http://archive.org/stream/reporttopresiden01unit#page/n9/mode/2up>> (accessed 12 May 2012). For more on the role of some of these Presidential commissions, see: Glen Hastedt, 'Foreign Policy by Commission: Reforming the Intelligence Community', *Intelligence and National Security* 22/4 (2007) pp. 443-72.

<sup>55</sup> Jordan et al., *American National Security*, p.81.

<sup>56</sup> Ibid, p.165. For the most recent changes, see: George W. Bush, Executive Order 13462, President's Intelligence Advisory Board and Intelligence Oversight Board, 29 February 2008.

<sup>57</sup> White House, 'The President's Intelligence Advisory Board', <<http://www.whitehouse.gov/administration/eop/piab>> (accessed 10 May 2012).

<sup>58</sup> White House, 'OMB Organization Chart', <[http://www.whitehouse.gov/sites/default/files/omb/assets/about\\_omb/omb\\_org\\_chart\\_0.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/about_omb/omb_org_chart_0.pdf)> (accessed 10 May 2012).

<sup>59</sup> White House, 'The Mission and Structure of the Office of Management and Budget', <[http://www.whitehouse.gov/omb/organization\\_mission/](http://www.whitehouse.gov/omb/organization_mission/)> (accessed 10 May 2012).

<sup>60</sup> For a description of the procedures applying to the Department of Defense, see: George B. Lotz, 'The United States Department of Defense Intelligence Oversight programme: Balancing National Security and Constitutional Rights', in Born and Caparini (eds), *Democratic Control of Intelligence Services*, pp. 119-23.

<sup>61</sup> Assistant to the Secretary of Defense for Intelligence Oversight, 'Mission and History', <<http://atsdio.defense.gov/>> (accessed 23 May 2012).

through their chain of command, to the ATSD (IO)'.<sup>62</sup> In addition, the Undersecretary of Defense for Acquisition, Technology and Logistics is responsible for all DOD acquisition efforts including intelligence-related programmes.<sup>63</sup> Within each intelligence agency, an Inspector General (IG) acts as an independent mechanism of control producing reports and investigations on how policies are implemented.<sup>64</sup> These reports are typically intended for the head of the agency or department and are periodically transmitted to Congress. Each agency also has a General Counsel who works with the Department of Justice (DOJ) to ensure the legality of the actions conducted by its employees.<sup>65</sup>

Overall, executive branch officials benefit from a positional authority associated with their role in the implementation of intelligence policies and budget. Accordingly, they enjoy direct access to relevant information (agencies premises, employees and data).<sup>66</sup> Furthermore, senior executive officials are regular consumers of intelligence products. The feedback they provide to intelligence producers can also be considered as a form of control that guides and, when necessary, redirects them. Moreover, the executive branch maintains control over other institutions' access to information.<sup>67</sup> Intelligence agencies can withhold or deny the information that provides the basis for any accountability relationship.<sup>68</sup> However, in practice no single individual has complete knowledge of all the programmes and operations carried out by the IC.<sup>69</sup> This is mainly due to the size of the community and the limited amount of time that is available to decision-makers. Within each agency, specific offices decide people's access to information when they supervise declassification, and accept or reject

<sup>62</sup> Lotz, 'The United States Department of Defense Intelligence Oversight programme', p.122. See also: Louis Fisher, 'National Security Whistleblowers', Congressional Research Service Report for Congress, 30 December 2005.

<sup>63</sup> Richard F. Grimmett, 'Intelligence Authorization Legislation: Status and Challenges', Congressional Research Service Report for Congress, 13 February 2012, p.7.

<sup>64</sup> Born and Leigh, *Making Intelligence Accountable*, p.58. For more on the Offices of Inspector General, see: Frederick M. Kaiser, 'Statutory Offices of Inspector General: Past and Present', Congressional Research Service Report for Congress, 25 September 2008; Frederick M. Kaiser, 'The watchers' watchdog: The CIA inspector general', *International Journal of Intelligence and CounterIntelligence* 3/1 (1989) pp. 55-75.

<sup>65</sup> Lowenthal, *Intelligence From Secrets to Policy*, p.194. On the role of the Office of Legal Counsel within the Department of Justice, see: Frederick A.O. Schwarz and Aziz Z. Huq, *Unchecked and Unbalanced. Presidential Power in a Time of Terror* (New York: The New Press 2008) p.190; A. John Radsan, 'Sed Quis Custodiet Ipsos Custodes: The CIA's Office of General Counsel?', *Journal of National Security Law & Policy* 2/2 (2008) pp. 201-55.

<sup>66</sup> For an account of the doctrinal debate in Constitutional Law about the limits of executive prerogatives, see: Christopher M. Ford, 'Intelligence Demands in a Democratic State: Congressional Intelligence Oversight', *Tulane Law Review* 81/3 (2006) pp. 759-60.

<sup>67</sup> During the presidency of George W. Bush the relevant regulations were: Executive Order 12958, 'Classified National Security Information', 13 April 1995; and Executive Order 13292, 'Further Amendment to Executive Order 12958, as Amended, Classified National Security Information', 25 March 2003. For more on their evolution, see: Kevin R. Kosar, 'Security Classification Policy and Procedure: E.O. 12958, as Amended', Congressional Research Service Report for Congress, 31 December 2009.

<sup>68</sup> See for example: Johnson, 'Accountability and America's Secret Foreign Policy', pp. 113-4.

<sup>69</sup> Dana Priest and William Arkin, *Top Secret America. The Rise of the New American Security State* (New York: Little, Brown and Company 2011) p.52.

Freedom of Information Act (FOIA) requests.<sup>70</sup> In turn, each government decision to declassify some material can be considered as a delayed transparency measure. Overall, the executive branch provides the factual basis, or transparency, necessary to democratic accountability.<sup>71</sup> In addition, intelligence agencies vet and train their employees. When doing so, they are able to shape their own organisational culture by prioritising and instigating particular values. Interestingly, the executive branch also vets congressional staffers and lawyers when they have a need to know classified information. Security vetting gives the executive branch an edge over the legislative and the judicial branches.<sup>72</sup> In the worst cases, this positional advantage can allow the executive branch to hide inefficiencies or improprieties, or ignore congressional guidance.<sup>73</sup> Considering all these advantages, the executive branch has a great responsibility towards its citizens. Nevertheless, when carrying out all these tasks, executive powers are subjected to relatively well-defined procedures and judicial review. In practice, inter-institutional tensions stemming from intricate institutional interdependencies appear regularly. These tensions are a sign of the democratic vitality of intelligence accountability in the US.

### Congress

The US Congress has a broad oversight mandate echoing its democratic legitimacy. It benefits from a wide range of powers in order to hold the executive branch and its intelligence services to account. At the most general level, the Congress has the power to legislate on intelligence matters in particular regarding mandates, methods and structure.<sup>74</sup> The legal framework provided by Congress plays a crucial role in delimitating clearly the capabilities of the IC. Most notably, Congress passed the National Security Act of 1947 that laid the foundation of the modern US national security apparatus.<sup>75</sup> The congressional power

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<sup>70</sup> In the case of the CIA, the Information and Privacy Coordinator is in charge of dealing with FOIA requests and the CIA Declassification Center is in charge of declassification. Central Intelligence Agency, 'Freedom of Information Act', <<http://www.foia.cia.gov/>> (accessed 12 May 2012).

<sup>71</sup> Frederick A.O. Schwarz, JR, 'The Church Committee and a New Era of Intelligence Oversight', *Intelligence and National Security* 22/2 (2007) p.276; Born and Leigh, *Making Intelligence Accountable*, p.82.

<sup>72</sup> Lowenthal, *Intelligence. From Secrets to Policy*, p.204; Richard K. Betts, *Enemies of Intelligence: Knowledge and Power in American National Security* (New York: Columbia University Press 2007) p.175; Ott, 'Partisanship and the Decline of Intelligence Oversight', p.78.

<sup>73</sup> See for example: Gill and Phythian, *Intelligence in an Insecure World*, p.158; Brit L. Snider, 'Sharing Secrets with Lawmakers: Congress as a User of Intelligence', in Roger Z. George and Robert D. Kline (eds), *Intelligence and the National Security Strategist: Enduring Issues and Challenges* (Oxford: Rowman and Littlefield 2006) p.91. See also: Schwarz, 'The Church Committee and a New Era of Intelligence Oversight', p.278; Loch K. Johnson, 'Balancing Liberty and Security', in George and Kline (eds), *Intelligence and the National Security Strategist*, p.80; General Accounting Office, Observations on GAO Access to Information on CIA Programs and Activities, GAO-01-975T, 18 July 2001.

<sup>74</sup> Lowenthal, *Intelligence From Secrets to Policy*, p.33.

<sup>75</sup> US Congress, Pub. Law 80-253, National Security Act of 1947, 80<sup>th</sup> Congress, 1<sup>st</sup> sess., 26 July 1947.

to legislate in other areas also provides it with some leverage over the executive branch. For example, Congress can use a strategy of logrolling, that is to say, withhold action in other areas to lever government compliance on intelligence matters.<sup>76</sup> In addition, as the representative of the taxpayers, Congress authorises (approves programmes and activities) and appropriates (allocates specific amounts of money to authorised programmes) funds for the intelligence budget.<sup>77</sup> The National Intelligence Program (NIP) is overseen by the House and Senate intelligence committees, while the Military Intelligence Program (MIP) is overseen by the two armed services committees and the House Permanent Select Intelligence Committee.<sup>78</sup> The congressional power of the purse is clearly enshrined in the American Constitution and constitutes one of its most significant instruments of guidance and oversight.<sup>79</sup> In this context, Congress can set personnel ceilings, define the structure and orientation of key programmes, and oversee their execution.<sup>80</sup> In exceptional circumstances, Congress can authorise the establishment of a commission of enquiry. For example, Congress established the 1998 Commission to Assess the Ballistic Missile Threat to the United States;<sup>81</sup> and the National Commission on Terrorist Attacks Upon the United States (often called the 9/11 Commission) was jointly established by the Congress and the President.<sup>82</sup>

When carrying its oversight functions, Congress relies on a pool of expertise provided by its staffers, investigative bodies such as the Government Accountability Office (GAO), the Congressional Research Service (CRS), and the Congressional Budget Office (CBO), and wider society. Congressional oversight is organised along committee lines. By restraining intelligence oversight to the work of a few committees, Congress acknowledges the need for secrecy and maintains democratic accountability. Since the 1970s, two committees are dedicated to the oversight of intelligence activities: the House Permanent Select Intelligence Committee (HPSCI), and the Senate Select Intelligence Committee (SSCI). These committees investigate allegations of wrongdoing and abuse, the performance of the

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<sup>76</sup> Roger Hilsman, Laura Gaughran, and Patricia A. Weitsman, *The Politics of Policy Making in Defense and Foreign Affairs. Conceptual Models and Bureaucratic Politics* (Englewoods Cliffs, NJ: Prentice Hall 1993) p.202.

<sup>77</sup> US Code, Title 50, Section 414, Funding of the Intelligence Services (2012); US Code, Title 50, Section 415, Notice to Congress of certain transfers of defense articles and defense services (2012).

<sup>78</sup> Grimmett, 'Intelligence Authorization Legislation', p.7.

<sup>79</sup> US Constitution, Article 1, Section 9.

<sup>80</sup> Lowenthal, *Intelligence From Secrets to Policy*, pp. 196-9; Abram Shulsky, *Silent Warfare: understanding the world of intelligence* (Oxford: Brassey's 1991) p.145.

<sup>81</sup> US Congress, Pub. Law 104-201, the National Defense Authorization Act for Fiscal Year 1997, 104<sup>th</sup> Congress, 2<sup>nd</sup> sess., 23 September 1996, Section 1321.

<sup>82</sup> Philip Zelikow et al. (eds) *The 9/11 Commission Report: final report of the National Commission on terrorist attacks upon the United States* (New York: W.W. Norton 2004) p.xv; US Congress, Pub. Law 107-306, Intelligence Authorization Act for Fiscal Year 2003, 107<sup>th</sup> Congress, 2<sup>nd</sup> sess., 27 November 2002.

intelligence community or any other matter of interest.<sup>83</sup> In order to carry out this task, they benefit from subpoena powers which give them full access to any piece of information deemed relevant to the course of their function.<sup>84</sup> This access to information is crucial to clarify facts and carry out effective oversight. In addition to the two intelligence committees, more than a dozen other committees has jurisdiction over national security matters.<sup>85</sup> This multiplicity of committees generates tension and diffuses power within the legislature.

Congressional committees levy reporting requirements to the executive branch. These requirements vary in scope, frequency and formality.<sup>86</sup> They are cost-free for the Congress but put a significant burden on intelligence agencies. The Senate has the power to confirm or reject nominations of senior intelligence officials, which makes it partly responsible for these officials' policies. Furthermore, Congressional leaders receive prior notification of covert actions. Although these representatives cannot formally veto covert actions, they can use notifications as a lever against the executive branch (threatening to disclose information or using logrolling strategies).<sup>87</sup> In case of major scandal, representatives can use a procedure of impeachment to vote the President out of office. Congress came close to this situation during the Watergate scandal (1972-1974),<sup>88</sup> which culminated in the resignation of President Nixon.<sup>89</sup>

Since the 1980s Congress has become a major consumer of intelligence. Marvin Ott points out that Congress has had increasing access to intelligence assessments, reports, briefings and testimony following the establishment of the two intelligence committees and the passage of the Intelligence Oversight Act of 1980.<sup>90</sup> This position raises interesting questions about congressional objectivity as a consumer and overseer of intelligence. In addition, Congress lies at the forefront of the American political life which grants it a capacity to focus public attention. This central position generates high expectations in terms

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<sup>83</sup> US Senate, Rules of procedure for the Select Committee on Intelligence, 110<sup>th</sup> Congress, 1<sup>st</sup> sess., 1 March 2007; US House of Representatives, Rules of Procedure for the Permanent Select Committee on Intelligence, 110<sup>th</sup> Congress, 1<sup>st</sup> sess., 18 January 2007; US Congress, National Security Act of 1947. For a comprehensive summary, see: Lowenthal, *Intelligence From Secrets to Policy*, pp. 196-203.

<sup>84</sup> US Code, Title 50, Section 413, General Congressional Oversight Provisions (2012).

<sup>85</sup> For a full list, see: Bert Chapman, *Researching National Security and Intelligence Policy* (Washington DC: CQ Press 2004) pp. 234-44. For more on the roles of the armed services committees, see: Grimmett, 'Intelligence Authorization Legislation', p.5.

<sup>86</sup> Lowenthal, *Intelligence From Secrets to Policy*, p.201.

<sup>87</sup> Shulsky, *Silent Warfare*, p.145. Shulsky argues that prior notification may be assimilated to a veto in situations of extreme opposition.

<sup>88</sup> This scandal emerged when a group of individuals connected to the committee for the re-election of President Nixon caught attempting to break into and then wiretapped the Democratic National Committee headquarters. The involvement of White House officials in the scandal and Nixon's attempt to cover it up, pushed him to resign.

<sup>89</sup> Andrew, *For the President's Eyes Only*, pp. 395-6.

<sup>90</sup> Ott, 'Partisanship and the Decline of Intelligence Oversight', p.75.

of responsibilities. Given its unique position and its strong democratic legitimacy, Congress carries the responsibility to explain national security to wider society and make it as transparent as possible. For example, Congress publishes reports or holds public hearings.<sup>91</sup> This capacity to investigate and disseminate information can foster some other congressional actions or simply act as a mechanism of reputational accountability embarrassing the executive branch. Occasionally, congressional investigations impact more clearly on the balance of powers within the government. The investigations carried out by the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities in 1975 (also called Church Committee) shed light on a series of abuses of civil liberties committed by the FBI and the CIA in the early Cold War, and paved the way for the institutionalisation of the congressional oversight of intelligence in the US.<sup>92</sup> Since then, Congress has provided the keystone of democratic intelligence accountability in the US.<sup>93</sup>

All these powers place Congress at the centre of the US system of intelligence accountability.<sup>94</sup> However, representatives have lacked time to devote to oversight, and personal expertise on intelligence matters. They rely on limited human resources. For example, in 2007, the SSCI was supported by some 45 staff members who were supposed to help oversee some 16 intelligence agencies and a budget of \$43.5 billion.<sup>95</sup> Furthermore, Congress is limited by its dependence on the executive branch. The legislative branch can only reliably hold the executive branch to account if it is able and willing to exert control as well as be overseen.<sup>96</sup> The IC has tended to consider representatives as outsiders.<sup>97</sup> In practice, congressional access to intelligence remains more limited than that of senior executive officials. A congressional expert has argued that they 'are better positioned to assess the quality of the Community's intelligence more accurately'.<sup>98</sup> Ultimately, Congress

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<sup>91</sup> Born and Leigh, *Making Intelligence Accountable*, p.94.

<sup>92</sup> US Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book II, Intelligence Activities and the Rights of Americans, 94<sup>th</sup> Congress, 2<sup>nd</sup> sess., 26 April 1976.

<sup>93</sup> Russell A. Miller (ed.), *US National Security, Intelligence and Democracy. From the Church Committee to the War on Terror* (London: Routledge 2008); Schwarz, 'The Church Committee and a new era of intelligence oversight', pp. 270-97.

<sup>94</sup> Johnson, 'Balancing Liberty and Security', p.79.

<sup>95</sup> For the budget data, see: Federation of American Scientists, 'Intelligence Budget Data', <<http://www.fas.org/irp/budget/index.html>> (accessed 22 May 2012). For the SSCI staff members, see: Legistorm, 'Senate Select Committee on Intelligence', <[http://www.legistorm.com/office/Senate\\_Select\\_Committee\\_on\\_Intelligence/687/27.html](http://www.legistorm.com/office/Senate_Select_Committee_on_Intelligence/687/27.html)> (accessed 22 May 2012).

<sup>96</sup> Hans Born and Ian Leigh, 'Democratic Accountability of Intelligence Services', *DCAF Policy paper No.19* (2007) p.6.

<sup>97</sup> Richard A. Posner, *Uncertain Shield. The U.S. Intelligence System in the Throes of Reform* (Oxford: Rowman and Littlefield 2006) p.201; Amy B. Zegart and Julie Quinn, 'Congressional Intelligence Oversight: The Electoral Disconnection', *Intelligence and National Security* 25/6 (2010) pp. 744-66.

<sup>98</sup> Alfred Cumming, 'Congress as a Consumer of Intelligence Information', Congressional Research Service Report to Sen. Dianne Feinstein (D-CA), 14 December 2005, pp. 1-2.

is accountable to the American people both for its oversight activities and the use it makes of intelligence product.<sup>99</sup>

### The Judiciary

The judicial branch is the guardian of the Constitution and the legal system. As a result, it is sporadically involved in intelligence matters.<sup>100</sup> The Judiciary guarantees the rights of individual litigants against abusive governmental actions and adjudicates their disputes with the government.<sup>101</sup> In other words, the courts play a vital role in the reconciliation of individual liberty and national security, of individual rights and the acquisition of information that is essential for the safeguard of the nation.<sup>102</sup> The judicial branch distinguishes itself from the other institutions of government by its strong reliance on the standard of legality. At the highest level, the standard is the US Constitution of 1787. For example, the Supreme Court has made a series of seminal decisions interpreting the ‘unreasonable search and seizure’ clause of the Fourth Amendment to the US Constitution.<sup>103</sup> At the lower levels, other Federal Courts review the intelligence measures emanating from the executive and legislative branches in the light of the rule of law and the constitutional order.<sup>104</sup> When so doing, the courts rely on a weighty body of laws and regulations. In 2007, for example, the Office of the Director of National Intelligence (ODNI) released a 700-pages legal reference book for the IC.<sup>105</sup> The extent of this legal regime allows the courts to review intelligence matters in multiple areas such as classification, espionage convictions, surveillance and civil liberties, and human rights. Yet, the Judiciary remains dependent on the scope of the laws acted by Congress and the regulations granted by the executive branch.

When interpreting and applying this body of law, the Judiciary sometimes act as an arbiter of statutory powers between the executive and legislative branches. In practice, the courts have traditionally been deferential to the executive branch.<sup>106</sup> Furthermore, the Judiciary access information to the extent the executive branch grants it honest and complete

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<sup>99</sup> For a similar argument, see: Fred Schreier, ‘The Need for Efficient and Legitimate Intelligence’, in Born and Caparini (eds), *Democratic Control of Intelligence Services*, p.41.

<sup>100</sup> US Congress, Pub. Law 95-511, Foreign Intelligence Surveillance Act, 25 October 1978. See also: Born and Leigh, ‘Democratic Accountability of Intelligence Services’, p.14.

<sup>101</sup> Samuel Issacharoff, ‘Political Safeguards in Democracies at War’, *Oxford Journal of Legal Studies* 29/2 (2009) p.207.

<sup>102</sup> Issacharoff, ‘Political Safeguards in Democracies at War’, p.212.

<sup>103</sup> For two seminal cases, see: US Supreme Court, *Olmstead v. United States*, 277 U.S. 438 (1928); US Supreme Court, *Katz v. United States*, 389 U.S. 347 (1967).

<sup>104</sup> DCAF intelligence Working Group, ‘Intelligence Practice and Democratic Oversight’, pp. 53-4.

<sup>105</sup> Office of the Director of National Intelligence, Office of General Counsel, *Intelligence Community Legal Reference Book* (Washington DC: ODNI 2007).

<sup>106</sup> Manget, ‘Intelligence and the Rise of Judicial Intervention’, p.44; Legal Expert on National Security, interview with author, 28 July 2011, Washington DC.



access to relevant information. Notably, judges and lawyers need to be vetted to access classified information. In some cases, courts can act *a priori*. For instance, the executive branch can submit informal requests for clarification (when it anticipates later problems), or formal requests for surveillance warrants concerning suspected foreign intelligence agents inside the US.<sup>107</sup> Such requests are sent to the Foreign Intelligence Surveillance Court (FISC). In the aftermath of the Watergate scandal and revelations of warrantless wiretapping of the personal communications of US citizens, Congress passed the Foreign Intelligence Surveillance Act (FISA) of 1978. This act established the FISC and granted it 'jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States'.<sup>108</sup> The surveillance requests submitted to this court must target a 'foreign power' or 'the agent of a foreign power'.<sup>109</sup> Overall, despite some limits, the Judiciary's ability to oppose Executive and Legislative decisions and to defend individual rights, make it an essential part of the US system of intelligence accountability.

### Society

In the US political system, wider society in the form of US citizens, think tanks, academia, interest groups, companies and media play a key role in holding decision-makers and senior intelligence officials accountable. There are various ways society can contribute to intelligence accountability. Citizens regularly hold their representatives in the executive and legislative branches to account through elections. However, intelligence affairs scarcely appear to have determined the outcome of presidential and congressional elections in the US. If anything, there seems to be an electoral disconnection.<sup>110</sup> At the margins, democratic elections act as a deterrent which force policy-makers to maintain a minimum level of public consent with their policies. Furthermore, shifts in public opinion may impact more subtly on intelligence accountability, for example, by persuading key representatives to take a more critical stance towards some specific intelligence activities. Media and interest groups are essential in facilitating relations of accountability in the US. They educate and mobilise public opinion, convey shifts in preferences and boost reputational accountability. For example, the Government Accountability Project (a public interest group based in Washington DC) was recently able to mobilise public opinion, and put pressure on the Obama administration to support the case of a former intelligence officer, Thomas Drake,

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<sup>107</sup> Born and Leigh, 'Democratic Accountability of Intelligence Services', p.15.

<sup>108</sup> US Code, Title 50, Section 1803, Designation of Judges (2012).

<sup>109</sup> Ibid, Section 1804, Application for Court Orders, and Section 1823, Application for Order (2012).

<sup>110</sup> Zegart and Quinn, 'Congressional Intelligence Oversight', pp. 760-4.

who was suspected of leaking classified documents about waste and mismanagement at the National Security Agency (NSA) to the press.<sup>111</sup> The interest group organised petitions (including to Congress)<sup>112</sup> and provided substantial legal advice and assistance to Drake during the pendency of his criminal case.<sup>113</sup> It also filed a whistleblowing reprisal complaint on behalf of him with the Department of Defense Inspector General.<sup>114</sup>

Commercial companies can refuse to cooperate with the IC as well. This was the case of some telecommunication companies who reportedly refused to take part in a warrantless wiretap programme carried out by the administration of George W. Bush in the aftermath of the 9/11 attacks.<sup>115</sup> Apparently, the legal risks of getting involved in the programme outweighed other rationales for cooperating with the government.<sup>116</sup> Other types of companies, media outlets, exert a more indirect form of scrutiny. Thanks to their capacity to reach the US electorate, newspapers such as the *Washington Post* and the *New York Times* have often triggered public pressure on the government by revealing abuses.<sup>117</sup> An obvious example is Seymour Hersh's reporting of CIA's operations against American anti-war activists that appeared on the front page of the *New York Times* on 22 December 1974.<sup>118</sup> In the long run, regular reporting of national security affairs fosters public awareness of intelligence issues.<sup>119</sup>

Despite remarkable achievements in this area, societal scrutiny of intelligence activities remains limited. Societal actors often lack institutional assets and authorities to

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<sup>111</sup> See for example: Jesselyn Radack, 'Why Thomas Drake is not an enemy of the state', *The Huffington Post*, 19 May 2011, <[http://www.huffingtonpost.com/jesselyn-radack/why-thomas-drake-is-not-a\\_b\\_864322.html](http://www.huffingtonpost.com/jesselyn-radack/why-thomas-drake-is-not-a_b_864322.html)> (accessed 10 June 2011).

<sup>112</sup> Government Accountability Project (GAP), 'Over 4,100 Citizens Stand Up for Tom Drake', 7 June 2011, <<http://www.whistleblower.org/press/press-release-archive/1155-over-4100-citizens-stand-up-for-tom-drake>> (accessed 2 September 2011).

<sup>113</sup> Judge Richard D. Bennett accepted an *amicus curiae* brief filed by GAP on behalf of Mr. Drake. The brief can be accessed on: Federation of American Scientists, <<http://www.fas.org/sgp/jud/drake/032911-amicus.pdf>> (accessed 1 September 2011).

<sup>114</sup> Jesselyn Radack (GAP), e-mail correspondence with author, 31 August 2011.

<sup>115</sup> Mark Hosenball and Evan Thomas, 'Hold the Phone. Big Brother Knows Whom You Call', *Newsweek*, 22 May 2006, <<http://www.thedailybeast.com/newsweek/2006/05/21/hold-the-phone.html>> (accessed 10 July 2011).

<sup>116</sup> Ellen Nakashima and Dan Eggen, 'Former CEO Says U.S. Punished Phone Firm', *Washington Post*, 13 October 2007, A1; Scott Shane, 'Former Phone Chief Says Spy Agency Sought Surveillance Help Before 9/11', *New York Times*, 14 October 2007, A27.

<sup>117</sup> Richard Aldrich, 'Regulation by Revelation? Intelligence, Transparency and the Media', in Robert Dover and Michael Goodman (eds), *Spinning Intelligence: Why Intelligence needs the Media, Why the Media Needs Intelligence* (New York: Columbia University Press 2009) pp. 13-36; Loch K. Johnson, 'A shock theory of congressional accountability for intelligence', in Loch K. Johnson (ed.) *Handbook of Intelligence Studies* (London: Routledge 2009) pp. 344-5.

<sup>118</sup> Seymour Hersh, 'Huge C.I.A. operation reported in U.S. against antiwar forces, other dissidents in Nixon years', *New York Times*, 22 December 1974, A1.

<sup>119</sup> See for example the work of Walter Pincus at the *Washington Post* and James Risen at the *New York Times*.

exert immediate and systematic effect on intelligence policies and activities.<sup>120</sup> In addition, public interest groups rely on existing institutional mechanisms of accountability. Some groups may decide to directly litigate against the government or provide support to citizens pursuing litigations against the government. These tactics are particularly adversarial and therefore often deployed in the last resort. For example, the American Civil Liberties Union (ACLU) successfully litigated under the Freedom of Information Act to gather and publicise a series of government documents on rendition, detention and interrogation during the presidency of George W. Bush.<sup>121</sup> When litigating, interest groups directly oppose government policies and challenge its position regarding the trade-off between national security and liberal democratic values. However their reliance on an institutionalised system that is notably deferential to the executive branch limits their room to manoeuvre.<sup>122</sup>

Media reporting can also be imbalanced, sensationalist and sometimes even inaccurate.<sup>123</sup> This can be related to the media's reliance on confidential governmental sources and the veil of secrecy that shrouds intelligence activities. In some cases, the government has considered that media reporting unduly damaged national security, for example, when information on the IC's ability to tap into bin Laden's satellite phone was published in news media. However, in this case, the government's claim has been weakened by evidence that this information was made public well before American news outlets released this information.<sup>124</sup> The unauthorised disclosure of thousands of US diplomatic cables by WikiLeaks is another case in point.<sup>125</sup> Such leaks of information are problematic since, as Richard Aldrich points out, 'for accountability to be embraced by practitioners, the intelligence services must believe that it makes them more effective'.<sup>126</sup> That is why Aldrich considers that this type of public scrutiny is confined to a reactive whistleblowing role or a role of 'regulation by revelation'.<sup>127</sup> Overall, society depends on members of the US

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<sup>120</sup> Marina Caparini, 'Controlling and Overseeing Intelligence Services in Democratic States', in Born and Caparini (eds), *Democratic Control of Intelligence Services*, pp. 23-4.

<sup>121</sup> American Civil Liberties Union, 'The Torture Report', <<http://www.thetorturereport.org/node/8>> (accessed 9 November 2011).

<sup>122</sup> For more on this, see: Van Puyvelde, 'Intelligence Accountability and the role of public interest groups in the US', p.152.

<sup>123</sup> For a similar point, see: Lowenthal, *Intelligence. From Secrets to Policy*, p.216.

<sup>124</sup> Glenn Kessler, 'File the Bin Laden Phone Leak Under "Urban Myths"', *Washington Post*, 22 December 2005, A02.

<sup>125</sup> On the 'WikiLeaks' affair, see: Damien Van Puyvelde, 'Médias, responsabilité gouvernementale et secret d'Etat: l'affaire Wikileaks', *Le Temps des Médias* 16/1 (2011) pp. 161-72.

<sup>126</sup> Richard Aldrich, 'Global Intelligence Co-operation versus Accountability: New Facets to an Old Problem', *Intelligence and National Security* 24/1 (2009) p.56.

<sup>127</sup> Aldrich, 'Regulation by Revelation?', pp. 13-36; James B. Bruce, 'Laws and Leak of Classified Intelligence: The Consequences of Permissive Neglect', *Studies in Intelligence* 47/1 (2003) pp. 39-49; Lowenthal, *Intelligence From Secrets to Policy*, p.216. Lowenthal points out how external actors tend to report intelligence scandals more than successes.

government when trying to access information. As a result, its role is often limited by information security constraints.<sup>128</sup> For example, journalists have delayed the publication of information that could threaten the lives of agents or the success of an operation.<sup>129</sup> In some cases, organisations decide to release information later in order to follow a specific agenda. Apparently, this has been the strategy followed by WikiLeaks when it threatened to release information before doing so.<sup>130</sup> Furthermore, when relying on leaks of information coming from the executive branch, society takes the risk to rely on a biased source, such as a disgruntled employee. In turn, though this external and unofficial means of scrutiny fosters participative democracy, it is not free from bias. The role all of these intelligence accountability holders play in the US system of intelligence accountability is summarised in table 1 (below).

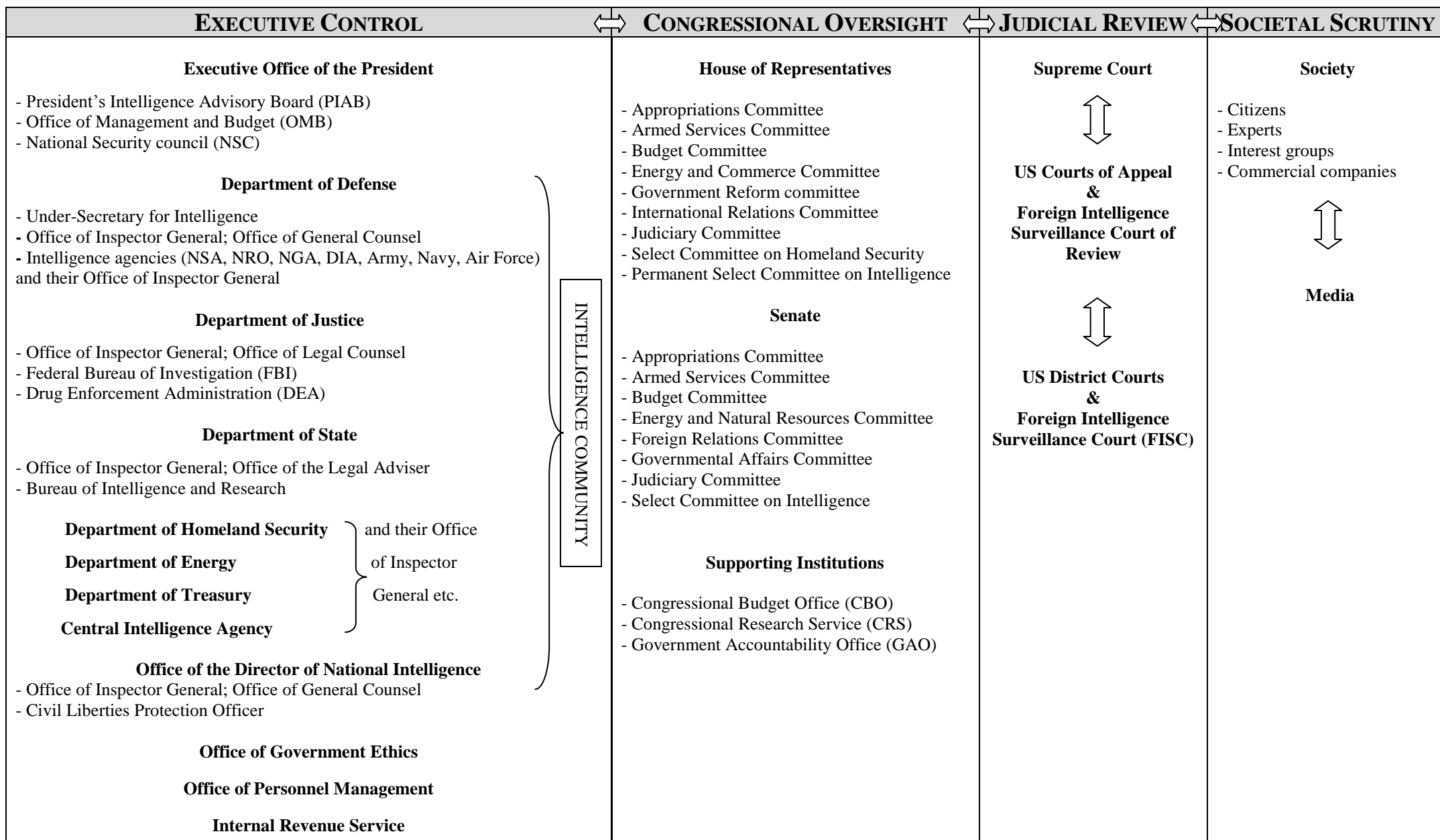
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<sup>128</sup> Kibbe, 'Congressional Oversight of Intelligence', p.25.

<sup>129</sup> For example, see: James Risen and Eric Lichtblau, 'Bush Let U.S. spy on Callers Without Courts', *The New York Times*, 16 December 2005, A1.

<sup>130</sup> Editor, 'WikiLeaks Threatens to Leak All Files',  
<<http://www.thedailybeast.com/cheats/2010/12/05/wikileaks-threatens-to-leak-all-files.html>> (accessed 24 May 2012).

**Figure 1 – US intelligence accountability holders (2001-2009)**



## The essence of intelligence accountability in a democracy

The trade-off between national security and liberal democratic values is the most crucial element of the conceptual framework presented in this chapter. Intelligence services play a vital role in informing and implementing policy-makers' preferences in the domain of national security. National security can be defined as the possibility for inhabitants of a state to live in the absence of internal and external threat to the quality of their life and values.<sup>131</sup> Threats to national security can therefore usually be understood as threats to the life and values of citizens and to their system of government. In practice, national security coexists with various other values.<sup>132</sup> Bernard Brodie points out that security is a derivative value, that is to say, a value that takes its meaning in the promotion of other values worth securing.<sup>133</sup> In this view, security is a means rather than an end. In a democracy, national security supports a political system - established through the apparatus of government - that the nation considers worth living in and defending.

The US system of government is characterised by an adherence to the liberal democratic values that are enshrined in the Constitution. These values are understood broadly as civil liberties including freedom of speech, assembly, and protection against unreasonable seizures, government transparency and the rule of law. In addition to democratic values, US citizens appear to give some importance to other values such as wealth, individualism, and morality.<sup>134</sup> Although some of these values are enshrined in the constitutional marble, they vary in time according to the American people's preferences and their expression through the US political system. For example, public support for security measures limiting civil liberties initially increased after the 9/11 attacks, and then gradually decreased.<sup>135</sup> Since attachment to particular values changes, so does the relation of these values to national security. In other words, intelligence services defend a set of values that are subject to alteration over time. Consequently, democratic intelligence accountability may be prone to instability. For example, when faced with a severe threat, a nation may favour security in relative terms over other values.<sup>136</sup> When trying to adjust security goals and democracy, accountability holders

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<sup>131</sup> This definition is based on: Richard H. Ullman, 'Redefining security', *International Security* 8/1 (1983) p.133; Arnold Wolfers, *Discord and Collaboration* (Baltimore, MD: John Hopkins University Press 1962) p.150.

<sup>132</sup> Glenn Hastedt, 'Controlling Intelligence: Defining the Problem', in Glen Hastedt (ed.), *Controlling Intelligence* (London: Frank Cass 1991) p.10.

<sup>133</sup> Bernard Brodie, 'Strategy as a science', *World Politics* 1/4 (1949) p.477.

<sup>134</sup> Foley, *American Credo*, pp. 37-72, 154-74.

<sup>135</sup> Alex R. Trouteaud, 'Civil Liberties', in John G. Geer (ed.), *Public Opinion and Polling Around the World: A Historical Encyclopedia* (Santa Barbara, CA: ABC-CLIO 2004) p.175.

<sup>136</sup> Brodie, 'Strategy as a science', p.477.

face a key conceptual tension between effectiveness or the capability of ensuring national security, and liberal democratic standards of behaviour.<sup>137</sup> Robert Jervis argues that ‘tensions between intelligence and democracy can never be entirely resolved’.<sup>138</sup> A more optimistic view holds that these tensions are not always resolved in an optimal way.

### **Effectiveness and liberal democratic values**

The quality of intelligence services depends upon a complicated relationship between effectiveness and liberal democratic values. This relationship comes down to the dialectic of means and ends and is spelled out in the following question: to what extent can a democracy maintain effective intelligence services without threatening democracy itself?<sup>139</sup> In a democratic system of intelligence accountability, this question is central to the work of any intelligence accountability holder. In addition to safeguarding democracy and maintaining effective intelligence services, finding the right trade-off helps disseminating a positive image of the country abroad and its moral and political leadership – an element that can, at times, be part of the national interest.

Policy-makers, managers and intelligence officers are under pressure to make the most effective use of their limited time and resources to ensure national security. Such pressures can foster a tendency to demand results and use questionable means such as ‘enhanced interrogation techniques’ to maintain national security. In turn, careless decision paths or the absence of clear direction can lead to wrongdoing such as the abuse of power (the use of torture) and misuse of power, such as carrying out one’s mission improperly or irresponsibly and using public authority for private interests. In most cases, these problematic situations result from the violation or the distortion of a delegation of public authority. In turn, abuses and misuses of powers can jeopardise both the effectiveness of intelligence activities and liberal democracy. For example, the requirements decision-makers impose on intelligence agencies can threaten the independence and the quality of intelligence activities. This was the case when former Representative Randy Cunningham (R-TX) received bribes

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<sup>137</sup> Maximilien Robespierre or Niccolò Machiavelli have pointed out similar correlations between ‘virtue and terror’, and ‘good arms and good laws’. See: Maximilien Robespierre, ‘On the Moral and Political Principles of Domestic Policy’, 5 February 1794, <<http://www.fordham.edu/halsall/mod/robespierre-terror.html>> (accessed 12 June 2012); Niccolò Machiavelli, *The Prince*, Quentin Skinner and Russel Price (eds) (Cambridge: Cambridge University Press 1988) p.42.

<sup>138</sup> Robert Jervis, ‘Intelligence, Civil-Intelligence Relations, and Democracy’, in Thomas C. Bruneau and Steven C. Boraz (eds), *Reforming Intelligence. Obstacles to Democratic Control and Effectiveness* (Austin, TX: University of Texas Press 2007) p.ix.

<sup>139</sup> For a similar point, see: Laurence Lustgarten and Ian Leigh, *In From the Cold. National Security and Parliamentary Democracy* (Oxford: Clarendon Press 1994) p.viii.

from a company and used his position to earmark DOD contracts to this company in exchange.<sup>140</sup> In this case, public money was invested in questionable programmes and the rule of law was broken.

Since the establishment of the US national security state in 1947, a process of legalisation of intelligence activities has aimed to ensure that they are viewed as justifiable and fair.<sup>141</sup> The rule of law establishes the framework under which intelligence actors' authorities and responsibilities are defined. This doctrine is crucial because it distinguishes intelligence officers from law-breakers.<sup>142</sup> In practice, the significance various intelligence accountability holders and holdees give to legality when compared to effectiveness is decisive. Evidence proves that legality does not always guarantee respect for people. During the presidency of George W. Bush 'enhanced interrogation techniques' such as waterboarding could be conducted lawfully by the CIA.<sup>143</sup> In addition, the sustainability of legality as a standard of reference depends on its application through daily monitoring.<sup>144</sup> Legality is therefore a necessary but sometimes insufficient standard to ensure respect for liberal democratic values. When the desire to gather information is too strong, the law or indeed human rights may not always remain a part of the equation. Ultimately, the application of legality in order to support liberal democratic values depends on the willingness of the accountability holders.<sup>145</sup> A reliable system of intelligence accountability maintains a complete and correct understanding of, and adherence to liberal democratic values, thanks to continuous education and training programmes.<sup>146</sup> Eventually, even in the best imaginable system of intelligence accountability, and even when no abuses or misuses of power are committed, tensions between effective national security and liberal democratic values come forth, more particularly in two areas that are central to what intelligence services do: secrecy and special powers.

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<sup>140</sup> For a summary of this case, see: Tim Shorrock, *Spies for Hire Spies for Hire. The Secret World of Intelligence Outsourcing* (New York: Simon and Schuster 2008) pp. 375-6.

<sup>141</sup> Samuel Huntington makes a similar case for professionalism as the best guarantee of civilian control over the American military. Samuel Huntington, *The Soldier and the State* (London: Belknap Press of Harvard University Press 1981) pp. 83-97.

<sup>142</sup> Born and Leigh, *Making Intelligence Accountable*, p.17.

<sup>143</sup> Gill, 'Security Intelligence and Human Rights', p.94; Michael Welch, 'Sovereign impunity in America's war on terror: examining reconfigured power and the absence of accountability', *Crime Law and Social Change* 47/3 (2007) p.142.

<sup>144</sup> Johnson, 'Balancing Liberty and Security', p.70; Schwarz, 'The Church Committee and a New Era of Intelligence Oversight', p.285; Gill and Pythian, *Intelligence in an Insecure World*, p.152.

<sup>145</sup> Gill, 'Security Intelligence and Human Rights', p.89.

<sup>146</sup> Ford, 'Intelligence Demands in a Democratic State', p.772.



### Secrecy and transparency

Intelligence has traditionally been shrouded in secrecy. Hans Born and Ian Leigh relate the essence of intelligence democratic accountability to the paradox of defending an open society by secret means.<sup>147</sup> Secrecy is essential to national security because it protects intelligence sources and methods.<sup>148</sup> That is to say, secrecy preserves informational advantages such as the origins and content of a piece of information, and the officers, agents or informants working for the intelligence community.<sup>149</sup> Concretely, secrecy is achieved by a vetting system and the classification of sensitive information in a series of compartments. In this system, duly vetted individuals are allowed to access the compartments containing the information they need to know. This arrangement minimises the circulation of knowledge and protects governments and their intelligence agencies against unwarranted intrusion. The application of secrecy can only be decided on a case-by-case basis since the need to know and the access to information it grants, always depends on the issue at stake.<sup>150</sup> In this context, Abram Shulsky recommends striking a balance between ‘the danger of widening the circle of those with access to the information and the benefit derived from the increased capability of the intelligence agencies’ political superiors to control their work’.<sup>151</sup>

However secrecy is a double-edge sword. Poor dissemination of crucial bits of information can prevent the IC to ‘connect the dots’ and anticipate impending threats to national security. Experts have argued that such a failure was at the basis of the 9/11 attacks.<sup>152</sup> A smooth flow of information is also crucial to democratic intelligence accountability.<sup>153</sup> Secrecy can jeopardise key intelligence accountability holders’ access to relevant information<sup>154</sup> and hamper public scrutiny. This is problematic because, as an expert on government transparency puts it, ‘the free flow of information to interested members of the public is a prerequisite to their participation in the deliberative process and to their ability

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<sup>147</sup> Born and Leigh, *Making Intelligence Accountable*, p.16.

<sup>148</sup> US Code, Title 50, Section 403-1 (i), Protection of intelligence sources and methods (2012).

<sup>149</sup> For an example of abusive dissemination of information threatening the life of an intelligence officer, see: Valerie Plame, *Fair Game: My Life as a Spy, My Betrayal by the White House* (New York: Simon & Schuster 2007) *passim*.

<sup>150</sup> Betts, *Enemies of Intelligence*, p.159; Müller-Wille, ‘Intelligence and Democratic Accountability’, p.495.

<sup>151</sup> Shulsky, *Silent Warfare*, p.132.

<sup>152</sup> For such an argument, see: John Miller and Michael Stone, *The cell: inside the 9/11 plot and why the FBI and CIA failed to stop it* (New York: Hyperion 2002) p.300; Zelikow et al. (eds), *The 9/11 Commission Report*, p.273. For a more general discussion see: Jennifer Sims, ‘Intelligence to counter terror: the importance of all-source fusion’, *Intelligence and National Security* 22/1 (2007) pp. 38-56.

<sup>153</sup> See for example: Müller-Wille, ‘Intelligence and Democratic Accountability’, p.495.

<sup>154</sup> Hulnick, *Fixing the Spy Machine*, p.19; Johnson, ‘Balancing Liberty and Security’, p.76; Frederick Schwarz, ‘The Church Committee, then and now’, in Miller (ed.), *US National Security, Intelligence and Democracy*, p.26.

to hold elected officials accountable'.<sup>155</sup> In turn, when public authorities do not communicate enough to the public, society can lose its confidence in government.<sup>156</sup> Dana Priest and William Arkin, two experienced investigative journalists specialised on national security affairs, argue that 'the more a nation comes to rely on secrecy to maintain its form of government and its relations with other countries, the more vulnerable it is to political turmoil once those secrets are revealed'.<sup>157</sup> The US intelligence community is notorious for having developed an excessive sense of ownership over intelligence information. This situation has led to systematic over-classification.<sup>158</sup> Gill and Phythian refer to a 'security fetishism' to convey the sense that secrecy may sometimes be pursued for its own sake.<sup>159</sup> In turn, the excessive pursuit of secrecy can limit the knowledge of both intelligence producers and consumers, and foster inefficiencies, for example in the form of unnecessary redundancies.<sup>160</sup>

In the worst cases, secrecy can facilitate abuses by covering wrongdoing.<sup>161</sup> Although secrecy is not a necessary condition for wrongdoings to occur, the cover it offers to intelligence agencies is problematic given the tumultuous history of the US intelligence community. This problem is particularly prominent in the case of covert actions. One of the central features of covert action is plausible deniability, that is to say, senior officials' ability to credibly deny involvement in covert activities. Plausible deniability allows governments to benefit from a third option, between war and diplomacy.<sup>162</sup> However, this principle has also allowed senior officials to keep their people uninformed of some of their most controversial activities such as paramilitary operations aiming to assassinate foreign leaders.<sup>163</sup>

### Special powers, civil liberties and human rights

When protecting national security, intelligence agencies also make use of special powers such as the conduct of surveillance and the tapping of telecommunication.<sup>164</sup> These powers are special (and worrying) because they allow intelligence agencies to violate civil liberties

<sup>155</sup> Steven Aftergood, 'Reducing Government Secrecy: Finding What Works', *Yale Law & Policy Review* 27/2 (2009) p.399.

<sup>156</sup> See for example: Kathryn S. Olmsted, *Real Enemies. Conspiracy Theories and American Democracy, World War I to 9/11* (Oxford: Oxford University Press 2009) pp. 6-12.

<sup>157</sup> Priest and Arkin, *Top Secret America*, p.266.

<sup>158</sup> Aftergood, 'Reducing Government Secrecy', pp. 400-1, 404-7; Daniel Patrick Moynihan, *Secrecy. The American Experience* (London: Yale University Press 1998).

<sup>159</sup> Gill and Phythian, *Intelligence in an Insecure World*, p.149.

<sup>160</sup> See for example: Priest and Arkin, *Top Secret America*, p.85.

<sup>161</sup> Gill and Phythian, *Intelligence in an Insecure World*, p.160; Schwarz, 'The Church Committee and a New Era of Intelligence Oversight', p.292.

<sup>162</sup> See for example: Loch K. Johnson, 'Covert Action and Accountability: Decision-Making for America's Secret Foreign Policy', *International Studies Quarterly* 33/1 (1989) p.82.

<sup>163</sup> Central Intelligence Agency, Memorandum for the record, 14 February 1972, MORI DocID: 1451843, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/top06.pdf>> (accessed 20 April 2013).

<sup>164</sup> For a list of these special powers, see: Born and Leigh, *Making Intelligence Accountable*, p.37.

and human rights. They constitute derogations that are only applicable to these agencies as an extraordinary domain of government. In accordance with the adage holding that *extraordinary circumstances require extraordinary powers*, the use of these powers is supposed to constitute a temporary restriction to the rights of a few, accepted in the pursuit of a greater societal interest or national security.<sup>165</sup> Special powers are principally concentrated in two types of intelligence activities: intelligence collection and covert action. Surveillance, a form of intelligence collection, inherently impinges upon individual privacy (the right to personal secrecy) and freedoms.<sup>166</sup> In the US, freedoms are constitutional standards. The First and the Fourth Amendments to the US Constitution guarantee the freedom of speech, the freedom of the press, the right to peaceably assemble, and guard against unreasonable searches and seizures.<sup>167</sup> The tension between these freedoms and the activities of the federal government gave birth to political debates early in the history of the US Republic, for example when Congress debated and passed the Alien and Sedition Acts of 1798.<sup>168</sup> With hindsight, Richard Betts remarks that the US Constitution and existing legislation are ambiguous.<sup>169</sup> This ambiguity is positive because it means that the Constitution is flexible enough to adapt to the evolutions of society. However, vagueness also provides for abuses in other circumstances. In the aftermath of the Second World War, the covert activities carried out by the FBI on US territory clearly threatened political freedoms at home. For example, the Bureau designed covert political actions aiming to damage and divide political groups considered to be subversive such as American Indians, black nationalists, and student leftist groups.<sup>170</sup> Furthermore, an internal CIA report compiled in the aftermath of the Watergate scandal, and nicknamed ‘the family jewels’, details 25 years of the Agency’s misdeeds.<sup>171</sup>

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<sup>165</sup> See: Gary Hart, ‘Liberty and Security’, in Miller (ed.), *US National Security, Intelligence and Democracy*, p.13; Born and Leigh, *Making Intelligence Accountable*, pp. 18, 89; DCAF intelligence Working Group, ‘Intelligence Practice and Democratic Oversight’, pp. 34-5.

<sup>166</sup> Michael Herman, ‘Modern Intelligence Services: Have they a place in ethical foreign policies’, in Harold Shukman (ed.), *Agents for Change* (London: St Ermin's Press 2000) p.304.

<sup>167</sup> See: US Constitution. Concerning the rights of foreigners, see: Schwarz, ‘The Church Committee and a New Era of Intelligence Oversight’, p.274; Betts, *Enemies of Intelligence*, p.160.

<sup>168</sup> Lowenthal, *Intelligence. From Secrets to Policy*, p.216

<sup>169</sup> Betts, *Enemies of Intelligence*, p.160.

<sup>170</sup> Ward Churchill and Jim Vander Wall, *Agents of Repression. The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement* (Boston, MA: South End Press 1988); James Kirkpatrick Davis, *Assault on the Left. The FBI and the Sixties Antiwar Movement* (London: Praeger 1997); Kenneth O'Reilly, ‘Introduction’, in Kenneth O'Reilly (ed.), *Federal Bureau of Investigation confidential files. McCarthy era blacklisting of school teachers, college professors, and other public employees [microform]: the FBI responsibilities program file and the dissemination of information policy file* (Bethesda, VA: University Publications of America 1989) pp. v, vii, ix; Rhodri Jeffreys-Jones, *The FBI: A History* (London: Yale University Press 2007) pp. 154-8.

<sup>171</sup> The report was released in 2007 following a FOIA request by the National Security Archives. See: National Security Archives, ‘The CIA's Family Jewels’, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/index.htm>> (accessed 16 May 2012). For more

Among other revelations, the report provides evidence that the CIA was engaged in the surveillance of US journalists and US citizens involved in the anti-war movement.<sup>172</sup> When they are made public, such activities have a more indirect ‘chilling effect’ on society in the sense that a simple awareness of the existence of surveillance might restrain social activism and free expression.<sup>173</sup>

### **A zero-sum game?**

The challenging relationship between national security and democracy is referred to by many experts as a balance or even a dilemma.<sup>174</sup> The claim that there is a balance between national security and democracy suggests a situation of zero-sum game<sup>175</sup> in which more respect for democratic values would impair effective security policies and vice versa.<sup>176</sup> This argument is problematic because it suggests the relationship between democracy and security is totally quantifiable. Moreover, the idea of a balance - in the sense of zero-sum situation - evokes the existence of a debate between those in favour of democracy, liberties and transparency and those in favour of security.<sup>177</sup> This notion does not apply to all the situations since more security does not always bring less democracy and vice versa. In some cases there is no zero-sum situation at all. Nicholas Dujmovic, a CIA historian, argues that intelligence activities can both further national security and respect democratic values because ‘there is no necessary contradiction between democracy and pluralism on the one hand and the secret collection and evaluation of information, along with the necessary use of covert means to effect a just foreign policy, on the other’.<sup>178</sup> Nevertheless, an intelligence agency using extreme methods can both threaten national security and disregard liberal democratic values.

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evidence, see: US Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities.

<sup>172</sup> See: James A. Wilderotter, Associate Deputy Attorney General, ‘Memorandum: CIA Matters’, 3 January 1975, pp. 2-4 <[http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/family\\_jewels\\_wilderotter.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/family_jewels_wilderotter.pdf)> (accessed 20 May 2012). For similar evidence in the case of the FBI and its Counter Intelligence Program (COINTELPRO), see: Ward Churchill and Jim Vander Wall, *The COINTELPRO Papers: Documents From the FBI's Secret Wars Against Dissent in the United States* (Boston, MA: South End Press 2002).

<sup>173</sup> Shulsky, *Silent Warfare*, p.152.

<sup>174</sup> See for example: Betts, *Enemies of Intelligence*, pp. 171-7; Denis A. Clift, ‘The Coin of Intelligence Accountability’, in Johnson (ed.), *Strategic Intelligence, Volume 5*, p.171.

<sup>175</sup> In economics, a zero-sum game is a situation in which the gain (or loss) made by an entity is always equal to the loss (or gain) of other entities. In either case, the sum of gain and loss sum to zero. See: Graham Bannock, Ron E. Baxter, and Evan Davis, *The Penguin dictionary of economics* (London: Penguin Books 2003).

<sup>176</sup> Betts, *Enemies of Intelligence*, p.162; Müller-Wille, ‘Intelligence and Democratic Accountability’, p.495.

<sup>177</sup> See for example: Herman, ‘Modern Intelligence Services’, pp. 296-7. Herman distinguishes between ‘absolutist’ and ‘pragmatist’. See also: Mark Urban, ‘The British Quest for Transparency’, in Steve Tsang (ed.), *Intelligence and Human Rights in the Era of global Terrorism* (London: Praeger Security International 2007) pp. 22-5. Urban points out a split between ‘human rightist’ and ‘reality checklist’.

<sup>178</sup> Nicholas Dujmovic, ‘Getting CIA History Right: The Informal Partnership Between Agency Historians and Outside Scholars’, *Intelligence and National Security* 26/2-3 (2011) p.238.

In the case of harsh interrogation techniques, public knowledge of their use can damage national security at the strategic level. For example, techniques involving human rights abuses can impact negatively on the battle for hearts and minds in a counter-insurgency campaign.<sup>179</sup> At a more abstract level, liberties define the democratic order and are therefore an essential part of its security in the sense of its subsistence.<sup>180</sup> The torture of foreign citizens in another country does not harm human rights at home, but it aims to increase national security while decreasing the rights of individuals and therefore erodes public attachment to democratic values. Benjamin Franklin famously said: ‘If we surrender our liberty in the name of security, we shall have neither’.<sup>181</sup> Accordingly, mechanisms of democratic accountability constitute key institutional assets in the pursuit of national security.<sup>182</sup> In fact, the restraint these mechanisms offer may even contribute to the effectiveness of intelligence services by focusing security policies on vital and reasonable tasks. The Church committee argued in 1975 that intelligence gathering on the anti-war movement in the 1960s and 1970s loosened the focus of the intelligence community and made it less effective.<sup>183</sup> Furthermore, intelligence accountability protects intelligence agencies’ integrity, which is essential to ensure public confidence and a sound accountability relationship between the people and the institutions of government.<sup>184</sup>

In some cases, the requirements of a democratic system of intelligence accountability may impact negatively on the capabilities and resources of intelligence agencies. Gill and Phythian emphasise that in the short run procedural requirements protecting privacy reduce the ability to conduct surveillance. Betts also argues that in a situation of uncertainty it is preferable to ‘err in the direction of saving lives than of maximizing privacy’.<sup>185</sup> For instance, the administration of George W. Bush decided to overlook traditional FISA requirements because it considered they contravened the ‘speed and agility’ of an NSA surveillance

<sup>179</sup> See for example: Brice Dickson, ‘Counter-Insurgency and Human Rights in Northern Ireland’, *Journal of Strategic Studies* 32/3 (2009) pp. 475-93.

<sup>180</sup> Issacharoff, ‘Political Safeguards in Democracies at War’, p.191.

<sup>181</sup> Benjamin Franklin, *An Historical review of the Constitution and the Government of Pennsylvania* (London: R. Griffiths 1883) p.289, <[http://books.google.co.uk/books?id=uTAmAAAAMAAJ&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.co.uk/books?id=uTAmAAAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false)> (accessed 20 November 2011). For a more modern take, see: Jerry Berman, and Lara Flint, ‘Guiding Lights: Intelligence Oversight and control for the Challenge of Terrorism’, *Criminal Justice Ethics* 1/2 (2003) p.58.

<sup>182</sup> See for example: Lustgarten and Leigh, *In from the Cold*, pp. 3-35; Ott, ‘Partisanship and the Decline of Intelligence Oversight’, p.70.

<sup>183</sup> US Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book II, pp. 205-6.

<sup>184</sup> For a similar argument, see: Jervis, ‘Intelligence, Civil-Intelligence Relations, and Democracy’, p.xii; Müller-Wille, ‘Intelligence and Democratic Accountability’, p.494.

<sup>185</sup> Betts, *Enemies of Intelligence*, p.169.

programme.<sup>186</sup> This measure was condemned by many experts and activists.<sup>187</sup> As a former CIA lawyer puts it: ‘one person’s problem may be another person’s oversight’.<sup>188</sup> Gill and Phythian maintain that the equation between operational effectiveness and liberal democratic values should take into account the long term.<sup>189</sup> Over time, states cannot achieve democratic legitimacy unless they consistently respect human rights and freedoms. A way to reconcile both timescales is to consider that some measures are necessary in the short term to support democracy in the long term. For example, Gill points out that more intrusive information gathering today may well prevent even more intrusive gathering in the future.<sup>190</sup> Both Betts and Gill develop the metaphor of a pendulum swinging between intelligence abuses leading to overreactions by the accountability holders such as micromanagement and intelligence failures initiating a shift in emphasis from democratic propriety to effectiveness.<sup>191</sup> According to Betts, an extra-legal policy established in time of panic is deemed to be rejected when the situation of emergency will subside.<sup>192</sup> Anne Joseph O’Connell suggests that in the case of intelligence failures too much transparency ‘may sometimes produce public anxiety that can lead to support for constraints on civil liberties’.<sup>193</sup> In turn, Betts argues that both intelligence officers and accountability holders should strike a balance to avoid overreactions.<sup>194</sup> However, the history of US intelligence suggests that when threats are considered to be imminent, overreactions are difficult to avoid.

Security, when it is excessive, can destroy what it aims to protect, democracy.<sup>195</sup> Likewise, excessive oversight or micromanagement can create friction or even prevent

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<sup>186</sup> Roberto R. Gonzales, ‘Prepared Remarks for Attorney General Alberto R. Gonzales at the Georgetown University Law Center’, 24 June 2006, <[http://www.justice.gov/archive/ag/speeches/2006/ag\\_speech\\_0601241.html](http://www.justice.gov/archive/ag/speeches/2006/ag_speech_0601241.html)> (accessed 8 February 2013). For a refutation of this argument, see: Elizabeth B. Bazan and Jennifer K. Elsea, ‘Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information’, Congressional Service Report for Congress, 5 January 2006, p.3.

<sup>187</sup> For example, see: Senator Patrick Leahy (D-VT), *Congressional Record*, 25 June 2006, p.S.137; Senator Dianne Feinstein (D-CA), ‘Setting the Record Straight on Warrantless Wiretapping Program’, *Huffington Post*, 31 July 2009, <[http://www.huffingtonpost.com/sen-dianne-feinstein/setting-the-record-straight\\_b\\_248787.html](http://www.huffingtonpost.com/sen-dianne-feinstein/setting-the-record-straight_b_248787.html)> (accessed 10 February 2013); Electronic Frontier Foundation, ‘FISC Orders on Illegal Government Surveillance’, <<https://www EFF.org/foia/fisc-orders-illegal-government-surveillance>> (accessed 10 February 2013).

<sup>188</sup> Radsan, ‘*Sed Quis Custodiet Ipsos Custodes*’, p.247.

<sup>189</sup> Gill and Phythian, *Intelligence in an Insecure World*, p. 155; Gill, ‘Not Just Joining the Dots But Crossing the Borders and Bridging the Voids’, p.41.

<sup>190</sup> Gill, ‘Democratic and Parliamentary Accountability of Intelligence Services after September 11<sup>th</sup>’, p.2; Betts, *Enemies of Intelligence*, p.171

<sup>191</sup> Betts, *Enemies of Intelligence*, pp. 171-7; Clift, ‘The Coin of Intelligence Accountability’, p.171; Gill, ‘Not Just Joining the Dots But Crossing the Borders and Bridging the Voids’, p.41.

<sup>192</sup> Betts, *Enemies of Intelligence*, p.165.

<sup>193</sup> Anne Joseph O’Connell, ‘The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World’, *California Law Review* 94/6 (2006) p.1719.

<sup>194</sup> Betts, *Enemies of Intelligence*, p.165.

<sup>195</sup> Gill and Phythian, *Intelligence in an Insecure World*, p.150; Hart, ‘Liberty and Security’, p.18.

intelligence services to focus on and ultimately achieve their missions.<sup>196</sup> However such situations do not necessarily occur. Two former intelligence officers conclude that intelligence accountability 'in and of itself is neither good nor bad. It can be very good if it helps (provide resources, technical solutions and advice, ideas, etc.), but it can really be bad if the overseers have agendas of their own that work against the success of programs.'<sup>197</sup> In the 1990s, the CIA - not the typical proponent of intelligence oversight - awarded the Agency Seal Medallion to Senator Daniel Patrick Moynihan (D-NY), a former chairman of the SSCI. Senator Moynihan received this award for having demonstrated 'that effective oversight of intelligence can be realized in a democratic nation without risk to the intelligence process'.<sup>198</sup> In other words, the CIA itself has recognised that the intelligence process is not necessarily hampered by intelligence oversight.

In practice, the relation between democracy and security is constantly and unevenly redefined according to particular contexts and missions.<sup>199</sup> Accountability holders must rely on proportionality and necessity to make their decisions.<sup>200</sup> In other words, they can consider whether the means (mostly collection techniques) that are deployed, are necessary and proportionate to the particular objectives (the scope and the nature of the security threat to be defused) of a mission.<sup>201</sup> In the case of surveillance, intelligence accountability holders must assess the proportionality between the benefits of increased knowledge against the costs of how it might have been acquired.<sup>202</sup> In this context, Michael Herman suggests that the most harmful methods should require the greatest justification or a severe and imminent threat.<sup>203</sup> Similarly, Betts looks at the potential impact of intelligence methods and argues for a specification and prioritisation of rights.<sup>204</sup> In other words, the right to freedom from imprisonment without trial is more important than the right of privacy.<sup>205</sup> In addition, the principle of proportionality is particularly relevant because it provides a customisable way for each intelligence accountability holder to relate his/her own interpretation of national security imperatives to his/her own attachment to liberal democracy.

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<sup>196</sup> See for example: Stephen F. Knott, *Secret and Sanctioned, Covert Operations and the American Presidency* (Oxford: Oxford University Press 1996) pp. 160-87; Betts, *Enemies of Intelligence*, p.177.

<sup>197</sup> Edmund H. Nowinski and Robert J. Kohler, 'The Lost Art of Program Management in the Intelligence Community. A View of How We Manage', *Studies in Intelligence* 50/2 (2006) p.39.

<sup>198</sup> Richard Gid Powers, 'Introduction', in Moynihan, *Secrecy. The American Experience*, p.3.

<sup>199</sup> For a similar point in another context, see: Brodie, 'Strategy as a science', p.479.

<sup>200</sup> DCAF intelligence Working Group, 'Intelligence Practice and Democratic Oversight', p.43.

<sup>201</sup> Gill, 'Democratic and Parliamentary Accountability of Intelligence Services after September 11<sup>th</sup>', p.18; Herman, 'Modern Intelligence Services', p.300.

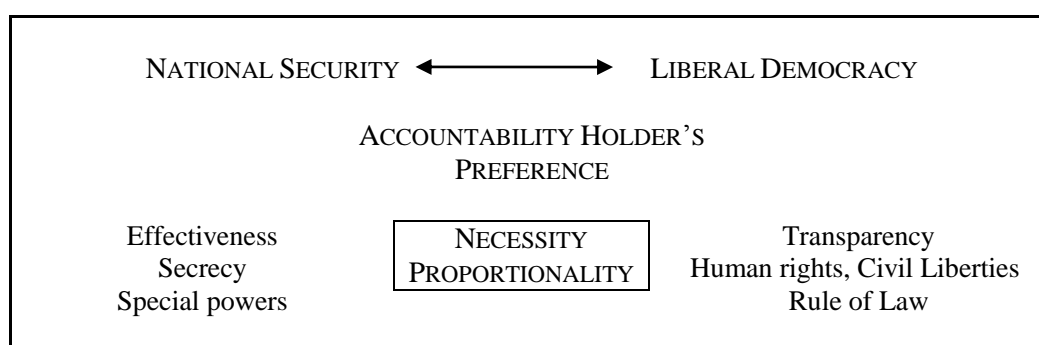
<sup>202</sup> Gill and Phythian, *Intelligence in an Insecure World*, p. 154.

<sup>203</sup> Herman, 'Modern Intelligence Services', p.300.

<sup>204</sup> Betts, *Enemies of Intelligence*, p.162.

<sup>205</sup> Ibid, pp. 163, 168.

**Figure 2 – The trade-off between national security and liberal democracy**



### **Intelligence accountability as a process**

Intelligence accountability is best understood as a process. At the most basic level, the accountability process encompasses the following phases: the occurrence of a problem, reaction/responses from accountability holders, and specific outcomes.<sup>206</sup> Even though the lines between these different phases are often blurred in practice,<sup>207</sup> this conceptual framework is particularly useful because it allows accounting for partial contributions to intelligence accountability and shows how multiple actors can get involved at different levels in the accountability process.<sup>208</sup>

#### *The occurrence of an accountability problem*

In order for accountability to occur between a holder and a holdee, a series of conditions needs to be fulfilled. When one of them is not fulfilled, usually as a result of new developments in the practice of intelligence or on the political arena, an accountability problem emerges. Mark Bovens points out three conditions necessary to achieve effective accountability: the accountability holder's access to relevant information, the existence of standards, and the availability of sanctions.<sup>209</sup> Based on available information, the accountability holder makes reference to standards to judge the accountability holdee's conduct and apply (or not) available sanctions. According to the situation, each accountability

<sup>206</sup> This understanding is broadly based on Loch Johnson's study of the American system of intelligence accountability between 1974 and 2004. See: Johnson, 'A shock theory of congressional accountability for intelligence', pp. 344-5.

<sup>207</sup> For a similar point, see: Richard Mulgan, 'The Processes of Public Accountability', *Australian Journal of Public Administration* 56/1 (1997) p.28.

<sup>208</sup> See: Kathleen Clark, 'The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program', *Brigham Young University Law Review* 2 (2010) p.362.

<sup>209</sup> Bovens, 'Analysing and Assessing Accountability', p.451.



holder has a different access to relevant information, adopts a specific position regarding particular standards, and holds enough authority to enforce his or her position.

In order to access relevant information, accountability holders need human and financial resources, but also the appropriate legal authority or need to know and the holdees' cooperation. When this access is secured, holders can take a position regarding the trade-off between national security and liberal democratic values. In turn, this position reflects their place in the US system of intelligence accountability and their preference at a certain point in time. In some cases, accountability holders may have very little leeway. Their position within the bureaucracy and existing legal standards may force them to take action or accept a situation they would personally disagree with. Behind the law and the bureaucracy, accountability holders make value judgments leading to decisions about the trade-off between security and democracy. Their decisions can favour security over liberties, or vice versa, as well as furthering or (unintentionally) lowering both the level of liberties and security. In the US, there is a legal standard that hold that intelligence agencies cannot spy on US citizens. However, particularly high levels of threats can encourage senior government officials to engage in domestic spying even if they know such a programme would threaten civil liberties and risks being deemed illegal in the eyes of other accountability holdees and holders. This was apparently the case of the warrantless wiretap programme pursued by the administration of George W. Bush in the aftermath of the 9/11 attacks.<sup>210</sup> In other cases, new intelligence practices may occur in an under-regulated context. When such regulatory gaps appear, the significance and impact of the moral and political standards followed by accountability holders is more apparent. In other cases, well-established accountability activities or procedures get distorted because of some accountability holders' preferences. For example, intelligence authorisations have failed to pass because accountability holders prioritised party politics over their oversight duty.<sup>211</sup> Eventually, when accountability holders have been able to access relevant information and refer to some standards, they can decide to threaten to use or make actual use of their authority to sanction holdees or rectify a problematic situation. In all cases, the application of sanctions or rectifications will depend on the accountability holders' willingness and legal authority.

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<sup>210</sup> Lichtblau and Risen, 'Bush Lets U.S. Spy on Callers Without Courts', A1.

<sup>211</sup> Richard F. Grimmett, 'Intelligence Authorization Legislation: Status and Challenges', Congressional Research Service Report for Congress, 13 February 2012, p.1.

### *The awareness of a problem: what triggers reactions and responses?*

The literature on intelligence accountability often takes the emergence of a problem as a point of reference to make the distinction between *ex-ante* and *ex-post* oversight. This distinction is derived from Mathew McCubbins and Thomas Schwartz' seminal study of congressional oversight in which they emphasise the distinction between two ideal-typical forms of oversight: 'police-patrol' and 'fire-alarm'. On the one side, police-patrol oversight is described as 'centralized, active and direct'. The two authors note: 'at its own initiative, Congress examines a sample of executive-agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations'. On the other side, fire-alarm oversight is:

less centralized and involves less active and direct intervention [...] Congress establishes a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions (sometimes in prospect), to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself.<sup>212</sup>

Based on this model, Schwartz and McCubbins assert that Congress prefers fire-alarms over police-patrolling.<sup>213</sup> This approach has been subject to various applications and criticisms in the literature on intelligence accountability.<sup>214</sup> The model is not always useful and often leads to the same conclusion: congressional oversight of intelligence is mostly reactive.<sup>215</sup> In addition, a survey of the relevant literature reveals the difficulty in determining the occurrence of *ex-ante* and *ex-post* accountability.<sup>216</sup> Measures of police-patrol usually rely on legislative productivity, in particular, authorising legislation and hearing activity. However, in practice, these factors often, if not always, occur in reply to some incident or stimulus. Moreover, Schwarz and McCubbins' model does not give enough attention to the executive control of intelligence, and for these reasons, their distinction will not be central to the thesis. Instead, this thesis considers that accountability actions are always triggered by some form of stimulus and explores accountability holders' reactions to learn about their sensitivity to

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<sup>212</sup> Mathew D. McCubbins and Thomas Schwartz, 'Congressional Oversight Overlooked: Police Patrols and Fire Alarms', *American Journal of Political Science* 28/1 (1984) p.166.

<sup>213</sup> Ibid, p.176.

<sup>214</sup> See for example: Zegart and Quinn, 'Congressional Intelligence Oversight', pp. 744-66; Loch K. Johnson, 'Accountability and America's Secret Foreign Policy', p.117. See also: Zegart, 'The Domestic Politics of Irrational Intelligence Oversight', pp. 1-25.

<sup>215</sup> See for example: Johnson, 'Accountability and America's Secret Foreign Policy', pp. 99-120.

<sup>216</sup> See: Zegart and Quinn, 'Congressional Intelligence Oversight', pp. 744-66; Johnson, 'Accountability and America's Secret Foreign Policy', pp. 100-1; Keith W. Smith, 'Congressional Use of authorization and Oversight', *Congress & the Presidency* 37/1 (2010) p.45.

different types of trigger. This focus allows avoiding the challenge of measuring anticipatory oversight as far as it exists. Amy Zegart has pointed out how this kind of oversight is difficult to track when she noted that ‘from the outside, it looks like no oversight at all’.<sup>217</sup> Ruth Grant and Robert Keohane wonder whether the concept of accountability itself overlooks the importance of mechanisms such as deliberation or participation and find that the mere existence of an accountability system exerts *ex-ante* effects through deterrence.<sup>218</sup> In other words, the existence of accountability mechanisms sanctioning wrongdoings after they occur, acts as an incentive for potential troublemakers not to misbehave. This thesis adopts a similar perspective and puts an emphasis on the political context in which incidents occur to reflect *ex-ante* deliberations as much as possible.

The question of what stimuli trigger intelligence accountability is crucial to further understanding of accountability holders’ willingness to take their responsibility. In this context, an accountability holder may be aware of a problem but not willing to invest the capital necessary to get informed and take action. Accountability holders’ reaction or absence of reaction to some problems is related to the strength of triggers. A ‘light trigger’ generates few reactions or a limited degree of accountability activity, involving a few actors (mostly in the concerned agency) and constrained rectifications. A ‘heavy trigger’ or scandal generates several public reactions as well as a more extensive accountability activity, involving many stakeholders with a longer and more in-depth investigative phase. It may draw wider attention - involving public debate, official statements, media coverage, and congressional hearings - to broader accountability gaps.<sup>219</sup> This pattern captures well how intelligence accountability activities can escalate from a limited to a more intensive level. The key difference between light and heavy triggers is the involvement of media and interest groups who bring issues to the attention of the society. This model therefore emphasises the role of public awareness of an incident in forcing key intelligence accountability holders - those with the power to regulate, or the executive and legislative branches of government - to take actions in order to maintain sufficient level of public confidence in their office, and more broadly in the institutions of government.

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<sup>217</sup> Zegart, ‘The Domestic Politics of Irrational Intelligence Oversight’, p.5.

<sup>218</sup> Grant and Keohane, ‘Accountability and Abuses of Power in World Politics’, pp. 30-1.

<sup>219</sup> These expectations fit relatively well Johnson’s shock theory. See: Johnson, ‘A shock theory of congressional accountability for intelligence’, pp. 343-60.

### Decision and outcome

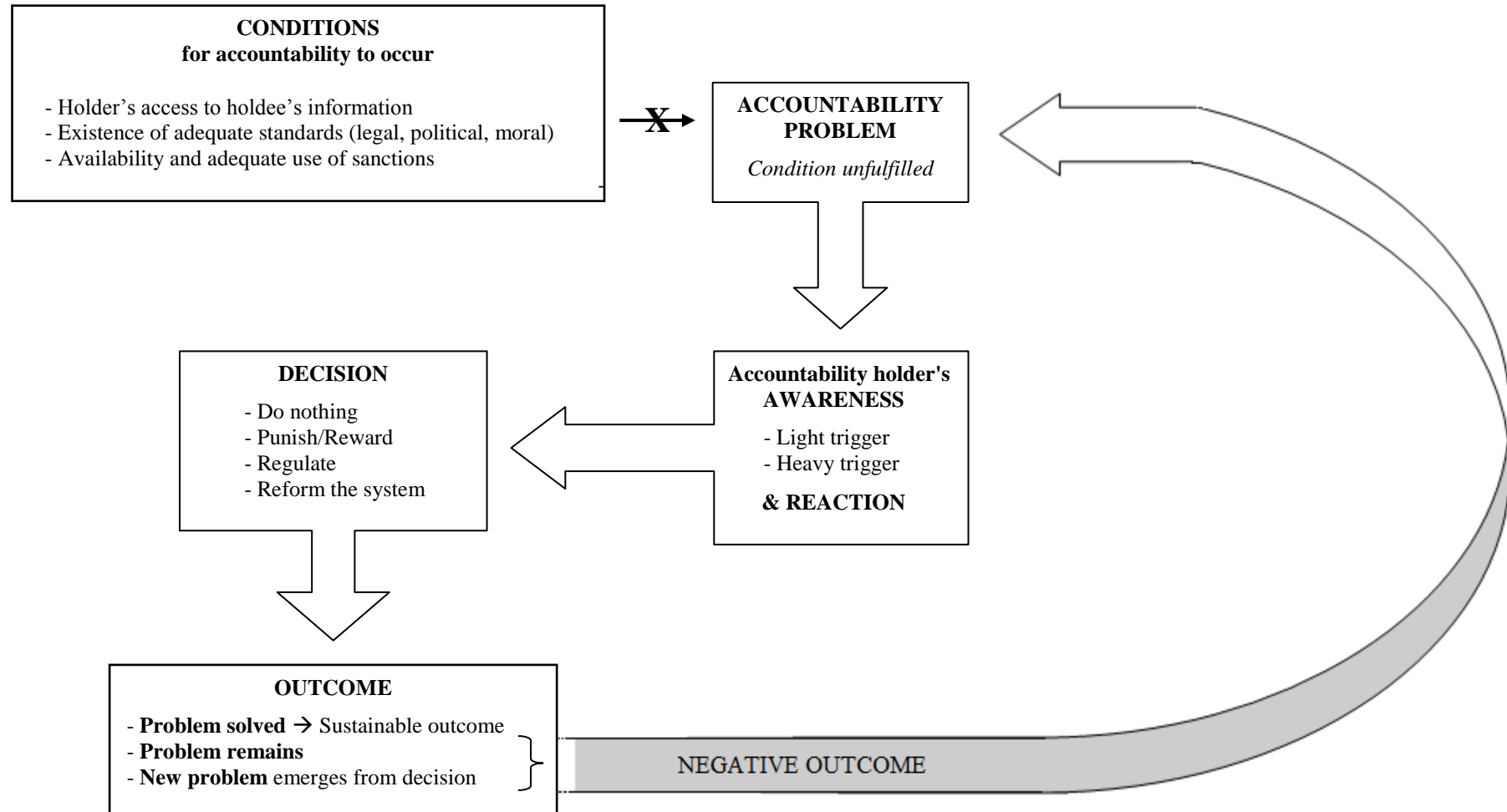
In an ideal context the recognition of a problem should provoke information gathering and sharing between accountability holders and holdees. In the best scenario the accountability holder will provide solutions to palliate apparent regulatory gaps or distortions of the accountability system.<sup>220</sup> In practice, depending on how strong accountability triggers are and how well the conditions for accountability have been fulfilled, accountability holders will or will not take decisions. In the case a decision is taken, based on the type of problem at hand, the accountability holder's position within the system, its preferences and authorities, the accountability holder will take action, that is to say: sanction the holdee, regulate on the accountability problem, or reform accountability procedures. Accountability holders' decisions can lead to three types of outcomes. First, in the best scenario, appropriate decisions are implemented, and lead to a sustainable outcome - the problem is solved. Second, some appropriate decisions are taken and implemented, but they do not solve the accountability problem. For example, decisions could solve only some parts of the problem by providing better access to information or they could only solve the problem temporarily. Third, the accountability decision creates new accountability problems. At this stage, stakeholders who are not satisfied with the outcome may want to reconsider the situation and support the adoption of new measures. The accountability process will start again. Finally, the model of intelligence accountability as a process and its application are best summarised graphically (below).

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<sup>220</sup> Clark, *The Architecture of Accountability*, pp. 356-7.

**Figure 3 - Model of intelligence accountability as a process**

**ACCOUNTABILITY HOLDERS** ↔ **ACCOUNTABILITY HOLDEES**



**Figure 4 – Application of the model**

Evaluation criteria	Indicators
<b>ACCOUNTABILITY PROBLEM</b>	
Existence of appropriate standards	<ul style="list-style-type: none"> <li>- Executive and legislative decisions and language</li> <li>- Existing Law and its application through court decisions</li> <li>- Secondary Literature (academia and media)</li> </ul>
Full and timely access to information	<ul style="list-style-type: none"> <li>- Legal authority</li> <li>- Informal relations</li> </ul>
Availability / Use of sanctions or regulation	<ul style="list-style-type: none"> <li>- Relevant law and regulations</li> <li>- Capabilities (specialised staff and structure)</li> </ul>
<b>AWARENESS</b>	
Light trigger	<u>Occasional reactions:</u> <ul style="list-style-type: none"> <li>- Mentions in (internal) executive reports</li> <li>- Mentions in congressional language</li> </ul>
Heavy trigger	<u>Sustained reactions:</u> <ul style="list-style-type: none"> <li>- Executive reports</li> <li>- Repeated expressions of legislative interest</li> <li>- Judiciary/prosecutions</li> <li>- Sustained public interest (media coverage and public interest groups)</li> </ul>
<b>DECISION</b>	
Do Nothing	<ul style="list-style-type: none"> <li>- Absence of Executive, Legislative measures</li> <li>- Absence of prosecution and indictment</li> </ul>
Punish/Reward	<ul style="list-style-type: none"> <li>- Executive decision (contract debarment, fine, new contract)</li> <li>- Legislative decision (logrolling, stop funding of a particular programme/ continue programme, expression of support)</li> <li>- Judiciary decision</li> </ul>
Regulate	<ul style="list-style-type: none"> <li>- Executive and/or legislative decision (new regulation or law) targeting the accountability problem</li> </ul>
Reform	<ul style="list-style-type: none"> <li>- Executive and/or legislative decision targeting the accountability system</li> </ul>
<b>OUTCOME</b>	
No more problem (relating to the issue)	<ul style="list-style-type: none"> <li>- Relevant decisions</li> <li>- Sustained period of time without any incident</li> </ul>
Persisting / New problem	<ul style="list-style-type: none"> <li>- Persisting incidents (news reports)</li> <li>- Persisting concern from key accountability holders (statements, reports)</li> </ul>

## Conclusion

This chapter considered intelligence accountability in the light of three main conceptual lenses focusing on the institutions, the essence and the process of intelligence accountability. Each of these approaches highlights a series of factors that are relevant to the study of intelligence accountability in the US. In the US Republic, democracy is organised around a series of separate institutions that share power. Consequently, the US system of intelligence accountability is characterised by a variety of stakeholders and procedures. All of these actors face a similar trade-off between national security and liberal democratic values. However, according to their situation and preferences at a certain point in time, accountability holders adopt different positions regarding this trade-off. In turn, national security and liberal democratic values can oppose each other, particularly when secrecy hinders transparency and when intelligence agencies' special powers threaten civil liberties and human rights. However, such conflicts do not always necessary occur. In some situations, the attitudes of accountability holders' and their holdees can harm or improve both national security and liberal democratic values at the same time.

The accountability relationship between the accountability holder and the holdee is approached as a process which is divided in three phases: the occurrence of a problem, reactions/responses from the accountability holders, and specific outcomes. An accountability problem occurs when one or more of the three following conditions are not fulfilled. First, the accountability holder needs to have access to relevant information about the holdee's activities. Second, the holder needs to refer to adequate and appropriate standards. Third, the holder needs to be able and willing to take the necessary decision (punish/reward, regulate, or reform). When these conditions are not fulfilled, incidents sometimes occur and trigger the accountability holder's awareness. The chapter develops a distinction between light and heavy trigger which emphasises the role media and interest groups can play in publicising accountability problems and forcing key accountability holders to react and respond. Finally reaction and responses lead to a specific outcome that can redefine the accountability relationship.

The history of intelligence accountability suggests that periods of sustained oversight and scrutiny, do not always prevent transgressions.<sup>221</sup> The conclusion that intelligence failures are inevitable can be extended to intelligence accountability,<sup>222</sup> and invites

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<sup>221</sup> Johnson, 'Accountability and America's Secret Foreign policy', p.107.

<sup>222</sup> See: Betts, *Enemies of Intelligence*, pp. 19-20. See also Hulnick, *Fixing the Spy Machine*, p.2.

intelligence accountability stakeholders to review their expectations in the light of the capabilities of intelligence agencies and the system of accountability that applies to them in a given country at a specific point in time. In this context, focusing on recent developments in a specific country can further academic understanding of intelligence accountability.